(27,563)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 808.

WILLIAM J. GIVENS, APPELLANT,

vs.

FRED G. ZERBST, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

APPEAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 30, 1920.

1 United States District Court for the Northern District of Georgia, Northern Division.

WILLIAM J. GIVENS, Appellant,

versus

FRED G. ZERBST, Warden of the United States Penitentiary at Atlanta, Georgia, Appellee.

Habeas Corpus.

Petition.

To the Honorable William T. Newman, Presiding Judge of the United States District Court for the Northern District of Georgia:

The petition of William J. Givens respectfully shows:

1. That on the 30th day of October, 1918, he was put on trial before a General Court-Martial, convened at Camp Sevier, Greenville, South Carolina, for the crime of murder alleged against him, growing out of the death in said Camp, on September 28th, 1918, of one Will McLurkin, colored, alleged to be a soldier therein.

2. That on said day, to wit, the 30th day of October, 1918, he pleaded not guilty to the charge and specifications (so) alleged against him, and that thereupon, from day to day, the trial proceeded, until the 19th day of November, 1918, when the said court-martial found him not guilty of murder but guilty of manslaughter.

3. That on the said 19th day of November, 1918, the said court-martial, acting under said finding, sentenced your petitioner to be dismissed the service and to be confined at hard labor for ten
2 years, in a place to be designated by the reviewing authority.

4. That on the 14th day of April, 1919, the said sentence was confirmed by the reviewing authority, and your petitioner was thereafter, to wit, on or about the 2nd day of May, 1919, confined thereunder in the Federal Prison at Atlanta, Georgia.

5. That the aforesaid sentence and confinement thereunder are illegal and void, for the reasons, among others, (1) that the record of said trial does not show that at the time of the commission of the crime in question your petitioner was an officer in the United States Army as was alleged against him, and not, therefore, amenable to military law; and (2) that said court-martial had no authority to hear and determine the said charge of murder, or the specifications thereunder, as alleged against your petitioner.

6. That your petitioner now is, and ever since on or about the 2nd day of May, 1919, has been, a prisoner, confined in said Federal

Prison, in the custody of Fred G. Zerbst, Warden thereof, under said illegal and void sentence pronounced against him on said 19th day of November, 1918, and confirmed on said 14th day of April, 1919, and is restrained of his liberty, in violation of the Constitution of the United States, and of the laws of the country.

Wherefore, your petitioner prays, that a writ of habeas corpus issue, directed to the said Fred G. Zerbst, Warden, commanding him to produce your petitioner before this Honorable Court, at the City of Atlanta, Georgia, or at some other convenient point, at such time as the Court shall direct, and that he then and there show the cause of your petitioner's detention, to the end that your petitioner may be discharged from custody.

And your petitioner will ever pray.

WILLIAM J. GIVENS,
Petitioner.

3 STATE OF GEORGIA,
County of Fulton, ss:

I hereby certify, that on this 11th day of December, in the year 1919, before me, the subscriber, a Notary Public of the said State, in and for the said County, personally appeared William J. Givens, the within named petitioner, and made oath, in due form of law, that the matters and things set forth and alleged in said petition are true, to the best of his knowledge, information and belief.

Witness my hand and Notarial Seal.

[Seal H. F. Frick, Notary Public, Fulton County, Ga.]

H. F. FRICK,
Notary Public.

United States District Court. Filed in Clerk's Office, December 15th, 1919. O. C. Fuller, Clerk.

Order Granting Writ to Issue.

Ordered, this 7th day of January, in the year Nineteen Hundred and Twenty, on the foregoing petition as amended of William J. Givens, by the United States District Court for the Northern District of Georgia, that the writ of habeas corpus issue in this case, as prayed therein, and that the same be made returnable at 3 o'clock, p. m., on the 8th day of January, 1920, before me.

SAM'L H. SIBLEY,
Judge of the United States District Court for the Northern District of Georgia.

Filed in Clerk's Office January 7, 1920.

O. C. FULLER,
Clerk,
By G. R. HOOD,
Deputy.

4 United States District Court for the Northern District of Georgia.

In the Matter of Petition of WILLIAM J. GIVENS for Writ of Habeas Corpus.

Amendment to Petition.

To the Honorable, William T. Newman, Presiding Judge of the United States District Court for the Northern District of Georgia:

The petitioner prays leave of the Court to amend the petition filed herein as follows:

1. By adding after the word "him" in the fourth line of paragraph 1 the following words: "under Article of War 92".

2. By striking out the last word in paragraph 2 and adding in lieu thereof the words: "violation of the Ninety-third Article of War".

3. By striking out paragraph 4 and inserting in lieu thereof the following:

"That on the 14th day of April, 1919, the said sentence was confirmed by the reviewing authority, and promulgated in orders of April 29th, 1919, and your petition was thereafter, to-wit, on or about the 2nd day of May, 1919, confined in the United States Penitentiary at Atlanta, Georgia, thereunder, a copy of said promulgated sentence being filed herewith, a part hereof, marked, "Exhibit 1".

4. By striking out paragraph 5 and adding in lieu thereof the following:

"That the said sentence, and confinement thereunder, are illegal and void, for the reasons, among others, (1) that the record of said trial does not show that at the time of the commission of the crime in question your petitioner was an officer in the United States Army, as alleged against him, nor that he was in any manner amenable to trial by court-martial; (2) that said court martial had no authority to hear and determine the said charge of murder, or the specification
5 thereunder, as alleged against your petitioner (*a*) because there was a time of peace in the United States when the crime in question was committed, (*b*) because the pleadings did not negative a time of peace; and (3) that said sentence, as so confirmed and promulgated did not include confinement in the United States Penitentiary at Atlanta, Georgia, or at any other place.

WILLIAM J. GIVENS,
Petitioner.

STATE OF GEORGIA,
County of Fulton:

On this 7th day of January, 1920, personally appeared Wm. J. Givens, petitioner named herein, and made oath in due form of law that the matters and things hereinbefore set out in this petition to amend are true as therein stated to his best knowledge, information and belief.

WILLIAM J. GIVENS.

Sworn to and subscribed before me this 7th day of January, 1920.

[Seal H. F. Frick, Notary Public, Fulton County, Ga.]

H. F. FRICK,
Notary Public, Georgia, Fulton County.

Order Granting Amendment.

Petition to amend granted as prayed, this 7th day of January, 1920.

SAM'L H. SIBLEY,
District Judge.

Filed in Clerk's Office January 7, 1920.

O. C. FULLER,
Clerk,
By G. R. HOOD,
Deputy.

6 (G. C. M. O. 139.)

War Department,
Washington, April 29, 1919.

General Court-martial Orders, No. 139:

Before a general court-martial which convened at Camp Sevier, S. C., October 30, 1918, pursuant to Special Orders, No. 172, October 10th, 1918, Headquarters, Camp Sevier, S. C., and of which Col. Orville H. Hall, Infantry, United States Army, was president, and Maj. Stanley F. Coar, Infantry, United States Army, judge advocate, was arraigned and tried—

Capt. William J. Givens, Infantry, United States Army.

Charge I. "Violation of the 92nd Article of War."

Specification. "In that Capt. William J. Givens, Inf., U. S. A., did at or near Camp Sevier, S. C., on or about the 28th day of Sept., 1918, with malice aforethought, wilfully deliberately, feloniously, unlawfully, and with premeditation kill one Pvt. Will Mc-

Larkin, 3rd Prov. Dev. Rgt., a human being, by shooting him with a revolver."

To which charge and specification the accused pleaded, "Not guilty".

Findings.

Of the Charge, "Not guilty, but guilty of violation of the ninety-third Article of War."

Of the Specification of the Charge, "Guilty, except the words 'with malice aforethought', 'deliberately', 'and with premeditation'; of the excepted words 'not guilty.'"

Sentence.

"To be dismissed the service and to be confined at hard labor, and at such place as the reviewing authority may direct, for ten (10) years."

The sentence having been approved by the convening authority and the record of trial forwarded for the action of the President, under the 48th Article of War, the following are his orders thereon:

7 In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution.

WOODROW WILSON.

The White House, 14 April, 1919.

116011-19.

[Seal. Office of Judge Advocate General. Official Copy. War Department.]

"EXHIBIT 1."

(Reverse Side.)

(G. C. M. O. 139.)

Captain William J. Givens, Infantry, United States Army, ceases to be an officer of the Army from April 30, 1919.

By order of the Secretary of War:

FRANK McINTYRE,
Major General, Acting Chief of Staff.

Official:
J. T. KERR,
Adjutant General.

Washington: Government Printing Office: 1919.

8 In the District Court of the United States for the Northern District of Georgia, Northern Division.

No. 10.

WILLIAM J. GIVENS, Petitioner,

vs.

FRED G. ZERBST, Warden of the United States Penitentiary at Atlanta, in the State of Georgia.

Habeas Corpus.

Amendment to Petition and Order.

To the Honorable, the Judge of Said Court:

The petitioner respectively prays leave to amend amended paragraph five (5) of his petition, by adding thereto the following:

"and (4) because the said court-martial which tried the accused was not legally constituted; in that the officer who appointed the court-martial, was, as is disclosed (*a*) by the precept shown in the Record, (*b*) by his action in reviewing said case, and (*c*) by the General Court Martial Order No. 139, a part of the amended paragraph (4) of the petition herein, promulgating the sentence in this case, a Camp Commander, and, as such, had no authority under the Articles of War covering the appointment of court-martials, to appoint other than a Special Court-Martial.

And petitioner will ever pray.

JNO. S. STRAHORN,
Attorney for Petitioner.

Order.

The foregoing amendment allowed and ordered filed. In open Court this the 24th day of January, 1920.

SAM'L H. SIBLEY,
United States Judge.

Filed in Clerk's Office Jan. 24, 1920.

O. C. FULLER,
Clerk.
By J. D. STEWARD,
Deputy.

9 In the District Court of the United States for the Northern District of Georgia. Northern Division, October Term, A. D. 1919.

No. 10.

WILLIAM J. GIVENS, Petitioner.

vs.

FRED G. ZERBST, Warden, United States Penitentiary at Atlanta, in the State of Georgia, Respondent.

Petition for Writ of Habeas Corpus.

The President of the United States of America, to Fred G. Zerbst, Warden of the United States Penitentiary, at Atlanta, in the State of Georgia, Greeting:

We command you that the body of William J. Givens, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before the Honorable Samuel H. Sibley, Judge of our District Court of the United States in and for the Northern District of Georgia, on the Eighth (8th) day of January, A. D. 1920, at three o'clock in the afternoon, in the United States District Court room in the City of Atlanta, Georgia, to do and receive all and singular those things which the said Honorable Samuel H. Sibley, Judge of said Court, shall then and there consider of him in this behalf; and have you then and there this writ.

Witness the Honorable Samuel H. Sibley, United States District Judge for the Northern District of Georgia, and the seal of the said Court, at Atlanta, Georgia, this the 7th day of January A. D. 1920.

[Seal U. S. District Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the United States District Court
for the Northern District of Georgia.

10 I hereby certify that I have this day served the Original habeas corpus as herein described on Fred G. Zerbst, Warden, personally.

This 8th day of January, 1920.

HOWARD THOMPSON,
U. S. Marshal,
By C. H. LIVSEY,
Deputy.

Returned into Clerk's Office this 8th day of January, A. D. 1920.

O. C. FULLER,
Clerk,
By J. D. STEWARD,
Deputy.

Order Discharging Writ.

In conformity with the opinion of the Court this date filed, the within writ of habeas corpus is hereby discharged and the petitioner remanded to custody.

This 2nd day of February, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

11 In the District Court of the United States for the Northern District of Georgia, Northern Division.

No. 10.

WILLIAM J. GIVENS, Petitioner,

vs.

FRED G. ZERBST, Warden of United States Penitentiary, Atlanta, Georgia.

Habeas Corpus.

Answer of Respondent.

And now comes Fred G. Zerbst, Warden of the United States Penitentiary at Atlanta, Georgia, and answering the writ of habeas corpus served on him in this case, says:

1. That William J. Givens was received at the United States Penitentiary at Atlanta, Georgia, on May 2, 1919, under and by virtue of a commitment and documents of which copies are hereto attached marked respectively exhibits "A", "B", and "C", which are referred to and made a part of this response. That by virtue of the aforesaid commitment and documents, Respondent has since the 2nd day of May, 1919, been holding and is now holding the said William J. Givens in said penitentiary.

2. Respondent further avers that he has reason to believe and does believe and therefore states the fact to be, that said General Court Marshal which tried the Petitioner, William J. Givens, was legally appointed and convened and had lawful jurisdiction over him and over the subject matter of the charges against him; that said General Court Marshal was lawfully convened by direction of the President pursuant to General Orders No. 56, dated "War Department, June 13, 1918", duly made and promulgated by the President, a copy of which said orders is hereto attached marked exhibit "D", and is referred to and made a part hereof.

12 3. Respondent further answering says, that he has reason to believe and does believe and therefore states the fact to be, that the findings of the Court Martial and the sentence imposed

by it were approved by Brigadier General F. H. French, the Commanding Officer at Camp Sevier who appointed said Court Martial; that the record of the trial and the sentence imposed by the Court Martial was made by him forwarded to the Adjutant General of the Army for action by the President, under Article of War 48; that the said record of trial was forwarded by the Secretary of War to the President for confirmation, pursuant to the requirements of the 48th Article of War; that the sentence imposed by the Court Martial was confirmed by the President and the penitentiary at Atlanta, Georgia, designated by him as the place of confinement.

4. Respondent answering further says he has reason to believe and does believe and therefore states the fact to be, that the method and procedure by which the place of confinement of the Petitioner, William J. Givens, was designated and his sentence carried into execution, was and is in conformity with long and well established practice of the President and the War Department in such cases.

5. Answering further Respondent denies that he unlawfully restrains the said Petitioner, William J. Givens, of his liberty, and says that the true cause of the detention and custody of the said William J. Givens is hereinbefore set out in this response.

6. Respondent further avers that he has reason to believe and does believe and therefore alleges the fact to be, that the trial, conviction and sentence of the said William J. Givens, and the imprisonment which he is now undergoing in the execution of said sentence, are lawful.

Wherefore, Respondent prays that the writ of habeas corpus in this case be dismissed, and that the Petitioner, William J. Givens, be remanded to the custody of Respondent.

13

FRED G. ZERBST,
Warden, U. S. Pentitentiary.

GEORGIA,
Fulton County:

Before the undersigned officer personally appeared Fred G. Zerbst, Warden of the United States Penitentiary at Atlanta, Georgia, who on oath says that the statements contained in the foregoing answer as being of his own knowledge are true, and that the statements therein contained made on information and belief he verily believes to be true.

FRED G. ZERBST,
Warden, U. S. Penitentiary.

Sworn to and subscribed before me this 24th day of January, 1920.

JON DEAN STEWARD,
Deputy Clerk U. S. Court,
Northern District of Georgia.

"EXHIBIT A."

War Department.

j-k 390.

The Adjutant General's Office.

Washington, April 29, 1919.

In reply refer to 201 (Givens, William J.)

The Warden, United States Penitentiary,
Atlanta, Georgia.

SIR:

I have the honor to transmit to you herewith for your information, copy of a telegram to the Commanding General, Camp Sevier, S. C., directing him to send Captain William J. Givens, Infantry, to Atlanta and deliver him to the United States Penitentiary there. It will be noted that Captain Givens has been sentenced by court-martial to confinement at hard labor for a period of ten years and that the sentence has been approved and ordered carried into execution by the President, and that the United States Penitentiary
14 at Atlanta has been designated as the place of confinement.

The official orders promulgating the sentence and ordering its execution will be published and copy sent to you in due time.

Very respectfully,

JOHN B. SHUMAN,
Adjutant General.

1 Incl.
A true copy.
January 10, 1920.
A. C. ADERHOLD,
Record Clerk.

"EXHIBIT B."

A. G. 201 (Givens, William J.) jk-390.

War Department Telegram.

Official Business.

Washington, April 29, 1919.

Commanding General, Camp Sevier, South Carolina:

Sentence of dismissal and confinement at hard labor for ten years imposed by general court-martial in case of Captain William J. Givens Infantry confirmed by President period Captain Givens ceases to be an officer of Army from April thirtieth nineteen nineteen

period United States Penitentiary Atlanta Georgia designated as place of confinement period

Notify Captain Givens at once and telegraph this office attention room three ninety date receipt by him of this notification period Place Captain Givens in confinement on receipt of this if not already confined and send him not before April thirtieth under proper guard to Atlanta and deliver him to Penitentiary

[SEAL.]

KERR.

Night Government.
A true Copy.
January 10, 1920.

A. C. ADERHOLD,
Record Clerk.

15

"EXHIBIT C."

(G. C. M. O. 139.)

General Court-Martial Orders, No. 139.

War Department,
Washington, April 29, 1919.

Before a general court-martial which convened at Camp Sevier, S. C., October 30, 1918, pursuant to Special Orders, No. 172, October 10, 1918, Headquarters, Camp Sevier, S. C., and of which Col. Orville H. Hall, Infantry, United States Army, was president, and Maj. Stanley F. Coar, Infantry, United States Army, judge advocate, was arraigned and tried—

Captain William J. Givens, Infantry, United States Army.

Charge I. "Violation of the 92nd Article of War."

Specification.—"In that Captain William J. Givens, Inf. U. S. A., did at or near Camp Sevier, S. C., on or about the 28th day of Sept., 1918, with malice aforethought; willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Pvt. Will McLurkin, 3rd, Prov. Dev. Rgt., a human being, by shooting him with a revolver."

To which charge and specification the accused pleaded, "Not guilty."

Findings.

Of the Charge, "Not guilty, but guilty of violation of the ninety-third Article of War."

Of the Specification of the Charge, "Guilty, except the words *words* 'with malice aforethought,' 'deliberately,' 'and with premeditation'; of the excepted words 'Not guilty.'"

Sentence.

"To be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for ten (10) years."

The sentence having been approved by the convening authority and the record of trial forwarded for the action of the President, under the 48th Article of War, the following are his orders
16 thereon:

In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution.

WOODROW WILSON.

The White House, 14 April, 1919.

116011-19.

Captain William J. Givens, Infantry, United States Army, ceases to be an officer of the Army from April 30, 1919.

By order of the Secretary of War:

FRANK McINTYRE,
Major General, Acting Chief of Staff.

Official:
J. T. KERR,
Adjutant General.

A true Copy.
January 10, 1920.
A. C. ADERHOLD,
Record Clerk.

"EXHIBIT D."

(G. O. 56.)

General Orders, No. 56.

War Department,
Washington, June 13, 1918.

I. Transportation will be furnished civilian attendents accompanying the remains of deceased officers, soldiers, nurses, field clerks, or civilian employees only when such attendants are civilian employees in the military service. (293. 12 A. G. O.)

II. Appendix II, General Orders, No. 49, War Department, 1916, is amended by inserting after the words "course of training for Engineer units of the senior division" on page 31, the following paragraph:

This course may be modified in individual cases for the purposes of adjusting it to the existing courses of the instructions, and of allowing credits for subject matter in such courses. Each modifi-

cation, however, must be submitted to the Chief of En-
17 gineers for his written approval before becoming effective under these regulations. (211. 33, A. G. O.).

III. By direction of the President the commanding officer of each of the following camps is empowered, under the 8th Article of War, to appoint general court-martial whenever necessary:

Camp Devens, Ayer, Mass.
Camp Upton, Yaphank, N. Y.
Camp Dix, Wrightstown, N. J.
Camp Meade, Annapolis, Md.
Camp Lee, Petersburg, Va.
Camp Jackson, Columbia, S. C.
Camp Gordon, Atlanta, Ga.
Camp Sherman, Chillicothe, Ohio.
Camp Taylor, Louisville, Ky.
Camp Custer, Battle Creek, Mich.
Camp Grant, Rockford, Ill.
Camp Pike, Little Rock, Ark.
Camp Dodge, Des Moines, Iowa.
Camp Funston, Fort Riley, Kans.
Camp Travis, San Antonio, Tex.
Camp Lewis, American Lake, Wash.
Camp Greene, Charlotte, N. C.
Camp Logan, Houston, Tex.
Camp Forrest, Chickamauga Park, Ga.
Camp Wheeler, Macon, Ga.
Camp Freemont, Palo Alto, Cal.
Camp Wadsworth, Spartanburg, S. C.
Camp Hancock, Augusta, Ga.
Camp McClellan, Anniston, Ala.
Camp Sevier, Greenville, S. C.
Camp McArthur, Waco, Tex.
Camp Cody, Deming, N. Mex.
Camp Bowie, Fort Worth, Tex.
Camp Sheridan, Montgomery, Ala.
Camp Shelby, Hattiesburg, Miss.
Camp Beauregard, Alexandria, La.
Camp Kearney, Linda Vista, Cal.
Camp Mills, Long Island, N. Y.

The Jurisdiction of commanding officers of camps under authority of this order shall be limited to persons subject to military law who are serving at camps commanded by them and who do not belong to tactical divisions serving thereat, except that the commanding general of a tactical division may, in his discretion, direct members of his division against whom charges have been preferred to report or be turned over to the commanding officer of the camp at which his division is serving for trial by general court-martial, transmitting to the commanding officer of the camp the charges and all papers in the case. Members of a division so ordered to report or to be turned over to the commanding officer of a camp for trial shall

be considered detached from the division until the charges
18 pending against them have been disposed of, and the commanding officer of the camp shall have jurisdiction to bring them to trial. (250. 42, A. G. O.)

IV. 1. The following cloths are adopted as standard material for officer's uniforms, and all uniforms for officers made in the future in the United States will be of one of these prescribed standards:

For coat and breeches. Summer wear:
a. An O. D. cotton.
b. A 13-ounce all-wool worsted gaberdine.
For coats, breeches, and overcoats:
a. A 12-ounce worsted serge.
b. A 17-ounce whipcord.
c. A 21-ounce whipcord or elastique.
For riding breeches:
a. A 24-ounce Bedford cord.
For overcoats:
a. A 30-ounce Melton or kersey.

Samples, according to standards adopted and on file in the office of the Quartermaster General, will be supplied to all local quartermasters and kept available for inspection by officers. All cloth will be supplied at cost by the Quartermaster Corps, and a sufficient quantity will be kept on hand by the various depot, camp, post, and station quartermasters to meet the contemplated requirements.

2. The Quartermaster Corps will invite bids for making uniforms. The contracts will be let at a specified cost per uniform, one contract (or more if necessary) to be let for each general supply depot; all uniforms or material purchased within the zone of jurisdiction of any depot to be supplied under the provisions of the contract of such depot. Contracts will be let in the usual manner to the lowest responsible bidder, care being taken that only firms experienced in making uniforms to measure should be considered responsible in this connection.

19 3. Contractors must have representatives at all camps, posts, and stations in the territory covered by their contracts, not necessarily living there, but to go there upon call of the local quartermaster, to measure, fit, and make delivery of uniforms and such alterations as may be required, the Government to furnish a suitable room or building for this purpose. Other tailoring in the nature of repairs, pressing, etc., is authorized, at rates to be determined by local commanding officers. Every garment must be guaranteed by the contractor to fit, and be made to fit, the officers' acceptance being proof thereof. All changes or alterations will be made at the expense of the contractor.

4. All properly fitted garments not delivered through no fault of the contractor will be taken by the local quartermaster at contract

price for delivery to officers, if practicable. If this is impracticable, the garments will be placed in stock for sale or issue.

5. Orders for uniforms will be made through the office of the local quartermaster, who will have supervision over the contractor's agent. The cost of the uniform will be the contract price plus the cost of the cloth. Officers purchasing uniforms will pay the local quartermaster the same, who in turn will settle with the contractor.

6. In addition to furnishing cloth to contractors as above noted, the Quartermaster Corps will furnish cloth at cost direct to officers who desire to have tailoring done by firms with which the Government does not have a contract.

7. Upon notice from the Quartermaster General that firms with which contracts have been made are prepared to make uniforms, all other contracts or agreements made by any branch or department of the Army for making officers' uniforms which interfere with the operation of this order, or contract executed in compliance therewith, will be terminated at once.

(421, A. G. O.)

20 By order of the Secretary of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:
H. P. McCAIN,
The Adjutant General.

(Washington: Government Printing Office: 1918.)

United States of America.

War Department,

Washington, January 8, 1920.

I hereby certify that the papers hereto attached are true and complete copies of official records on file in The Adjutant General's Office of the War Department.

P. C. HARRIS,
Major General, U. S. Army,
The Adjutant General.

I hereby certify that P. C. Harris, who signed the foregoing certificate, is the The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Newton D. Baker, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant and Chief Clerk of

the said Department, at the City of Washington, this 8th day of January, 1920.

[Seal United States of America. War Office.]

NEWTON D. BAKER,
Secretary of War.
By JOHN C. SCOFIELD,
Assistant and Chief Clerk.

War Department.
Standard Form No. 13.
3–1826.

21

Western Union.

Telegram.

Anniston, Ala., May 7, 1918.

From William J. Givens, First Lieut. Inf. U. S. N. G.
To Adjutant General of the Army.
Subject Acceptance of Commission.

I hereby accept my commission as First Lieutenant of Infantry in the National Guard of the United States.

(Signed) WILLIAM J. GIVENS,
1st Lieut. Inf.

Received A. G. O. May 9, 1918.

Headquarters, Provisional Casual Battalion,
Camp Sevier, Greenville, S. C., May 21, 1918.

From: First Lieut. William J. Givens, Inf. U. S. N. G.
To: The Adjutant General of the Army.
Subject: Personal Report.

1. In compliance with telegraphic instructions of May, 4, 1918, from the Adjutant General of the Army, to the Commanding Officer of Third Officers' Training Camp, Camp McClellan, Alalama, I proceeded on May 7th, 1918, to Camp Sevier, Greenville, S. C., reporting thru Assistant Division Adjutant, Major J. S. Caldwell, to Brig. Gen. Gatley for duty, May 10, 1918.

WILLIAM J. GIVENS,
1st Lieut. Inf. U. S. N. G.

Received A. G. O., May 23, 1918.

Western Union.

Telegram.

1918, Sep. 27, Am. 9:30.

A158 An 47 Govt.
Camp Sevier, S. C. 914A 27,
Adjutant General of the Army,
Room 363 Washington, D. C.

22 Pursuant to telegraphic instructions War Department Dated Sept. 23, 1918, I hereby accept my commission as Captain of Infantry United States Army.

WILLIAM J. GIVENS,
Capt. Infy. U. S. A. Commanding Co. B.

Received A. G. O. Sep. 27, 1918.

The President of the United States of America, to all who shall see these presents, greeting:

Know ye, that reposing special trust and confidence in the patriotism, valor, fidelity and abilities of William Joseph Givens I do appoint him Captain of Infantry in the United States Army to rank as such from the ninth day of September nineteen hundred and eighteen. He is therefore carefully and diligently to discharge the duty of the office to which he is appointed by doing and performing all manner of things thereunto belonging.

And I do strictly charge and require all Officers and Soldiers under his command to be obedient to his orders as an officer of his grade and position. And he is to observe and follow such orders and directions, from time to time, as he shall receive from me, or the future President of the United States of America, or the General or other Superior Officers set over him, according to the rules and discipline of War.

This Commission to continue in force during the pleasure of the President of the United States, for the time being and for the period of the existing emergency, under the provisions of an Act of Congress approved May eighteen, nineteen hundred and seventeen.

Given under my hand at the City of Washington, this ninth day of September, in the year of our Lord one thousand nine hundred and eighteen and in the one hundred and forty-third year of the Independence of the United States.

23 By the President:

B. CROWELL,
The Assistant Secretary of War.

The Adjutant General's Office.
Recorded: Feb. 12, 1919.
R. G. PAYNE,
Adjutant General.

A. G. 201 (Givens, William J.) jk 390.

Commanding General, April 29, 1919.
Camp Sevier, South Carolina.

Sentence of dismissal and confinement at hard labor for ten years imposed by general court-martial in case of Captain William J. Givens Infantry confirmed by President period Captain Givens ceases to be an officer of the Army from April thirtieth nineteen nineteen period United States Penitentiary Atlanta Georgia designated as place of confinement period Notify Captain Givens at once and telegraph this office attention room three ninety date receipt by him of this notification period Place Captain Givens in confinement on receipt of this if not already confined and send him not before April thirtieth under proper guard to Atlanta and deliver him to Penitentiary.

Night Government. KERR.

John B. Shumm.

Out

Officers' Division.

3 P. M.

Western Union.

Telegram.

A 288D 5 0 Govt

1919 Apr 30 PM 546

Camp Jackson SC 525P 30

The Adjutant General of the Army

Attention Room Three Ninety Washington DC
Retel April Thirtieth to Commanding Officer Camp Sevier SC

24 Reference sentence adjudged Captain W J Givens was quoted in wire to this camp where Captain Givens is in confinement period Sentence was read to Captain Givens this Date.

Received A. G O May 1, 1919. LEE.

United States of America.

War Department.

Washington, January 20, 1920.

I hereby certify that the official records on file in The Adjutant General's Office of the War Department show that William J. Giv-

ens was called into the service of the United States as a member of a National Guard organization, June 29, 1916; that he was appointed first lieutenant, National Guard, April 19, 1918; that he accepted the appointment May 7, 1918; that he was appointed Captain of Infantry, United States Army, September 9, 1918, and that he accepted the commission September 25, 1918.

P. C. HARRIS,
Major General, U. S. Army,
The Adjutant General of the Army.

I hereby certify that P. C. Harris, who signed the foregoing certificate, is the The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Newton D. Baker, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant and Chief Clerk of the said Department, at the City of Washington, this 20th day of January, 1920.

[Seal United States of America. War Office.]

NEWTON D. BAKER,
Secretary of War.
By JOHN C. SCOFIELD,
Assistant and Chief Clerk.

War Department.
Standard Form No. 13.
3-1826.

25

United States of America.

War Department.

Washington, January 20, 1920.

I hereby certify that the attached five typewritten sheets are true copies of the following papers on file in the office of the Judge Advocate General, United States Army, in connection with the record of trial by general court-martial at Camp Sevier, South Carolina, October 30, 1918, in the case of Captain William J. Givens, Infantry, United States Army:

1. Action of reviewing authority, Brigadier General F. H. French.

2. (In three sheets) Letter of Acting Secretary of War, transmitting case to President and enclosing draft of Executive Order.

3. Action of the President confirming sentence.

E. A. KREGER,
Acting Judge Advocate General,
United States Army.

I hereby certify that E. A. Kreger, who signed the foregoing certificate, is the Acting Judge Advocate General, United States Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Newton D. Baker, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant and Chief Clerk of the said Department, at the City of Washington, this 20th day of January, 1920.

[Seal United States of America. War Office.]

NEWTON D. BAKER,
Secretary of War
By JOHN C. SCOFIELD,
Assistant and Chief Clerk.

War Department.
Standard Form No. 13.
3-1826.

(1)

26 Headquarters Camp Sevier, S. C., Dec. 6, 1918.

To the Adjutant General of the Army, Washington, D. C.

In the foregoing case of Captain William J. Givens, Inf., the sentence is approved and the record of trial is forwarded for action under the 48th Article of War.

(Signed)
F. H. FRENCH,
F. H. FRENCH,
Brigadier-General, Commanding.

(2)

War Department.
Washington, March 26, 1919.

The President:

Herewith transmitted to you is the record of trial by general court-martial at Camp Sevier, South Carolina, on October 30, 1918, of Captain William J. Givens, Infantry, U. S. A., who was charged with murder in violation of the 92nd Article of War. The Court in its finding eliminated the elements of that offense and found him guilty of manslaughter, in violation of the 93rd Article of War. He was sentenced to be dismissed the service, and to be confined at hard labor at such place as the reviewing authority might direct for ten (10) years. The reviewing authority approved the sentence and forwarded the record for your action under the 48th Article of War.

The Judge Advocate General, upon a review of the record, finds that the evidence, although mostly circumstantial, was sufficient to show that the accused sometime in the early morning of September 28, 1918, at Camp Sevier, South Carolina, shot and killed one Pri-

vate Will McLurkin by shooting him with a revolver, although it failed to show any motive for the killing, or the circumstances under which it occurred.

Accused testified as his sole defense that on the night of the shooting he had been drinking ethyl alcohol and was "dead drunk" and had only a hazy recollection of the events of the night. He
27 said that he remembered talking to someone and having fired a shot, but he did not remember whether there was anyone with him when he fired the shot; that the next thing he remembered he was being awakened in his quarters on the morning of September 28th. In a confession he said he remembered having explained to a person with him before firing the shot, "Why God Damn You, I will kill you."

During the trial the question of the sanity of the accused became an issue in the case and a medical board was appointed in accordance with the Manual for Courts-Martial for the purpose of examining into and reporting whether the accused had, at the time of the shooting, the necessary criminal mind to commit the offense alleged. The board found that the accused gave no evidence of insanity, either past or present.

The Judge Advocate General recommends that the sentence be confirmed and the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement, such confinement being authorized by the common law as described in the 42nd Article of War and by section 802 of the Code of the District of Columbia; dismissal from the service being authorized by the 93rd Article of War. I concur in the recommendation of the Judge Advocate General and herewith inclose a draft of executive order designed to carry this recommendation into effect, should it meet with your approval.

Very respectfully,

(Signed) BENEDICT CROWELL,
Acting Secretary of War.

2 Inclos.

In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution.
The White House, 1919.

(3)

28 In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution.

(Signed) WOODROW WILSON.

The White House, 14 April, 1919.

United States of America.

War Department.

Washington, January 20, 1920.

I hereby certify that upon April 29, 1919, Brigadier General J. T. Kerr was Adjutant General in Charge of Office, said Office being the Office of The Adjutant General of the Army, Washington, D. C.; that said Brigadier General Kerr occupied said position having been appointed thereto by reason of being the senior officer on duty in The Adjutant General's Office in the absence of The Adjutant General, and that by virtue of said position said Brigadier General Kerr was authorized to sign official messages, acting by direction of the Secretary of War, carrying out the orders of the President, and that he did act in pursuance of such authority in dispatching from said office a telegram in the following words and figures:

April 29, 1919.

Commanding General, Camp Sevier, South Carolina:

Sentence of dismissal and confinement at hard labor for ten years imposed by general court-martial in case of Captain William J Givens Infantry confirmed by the President period Captain Givens ceases to be officer of Army from April thirtieth nineteen nineteen period United States Penitentiary Atlanta Georgia designated as place of confinement period Notify Captain Givens at once and telegraph this office attention room three ninety date receipt by him of this notification period Place Captain Givens in confinement on receipt of this if not already confined. and send him not before April thirtieth under proper guard to Atlanta and deliver him to Penitentiary.—KERR.

29

P. C. HARRIS,
Major General, U. S. Army,
The Adjutant General.

I hereby certify that P. C. Harris, who signed the foregoing certificate, is the The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Newton D. Baker, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant and Chief Clerk of the said Department, at the City of Washington, this 20th day of January 1920.

[Seal United States of America. War Office.]

NEWTON D. BAKER,
Secretary of War.
By JOHN C. SCOFIELD,
Assistant and Chief Clerk.

War Department.
Standford Form No. 13.
3-1826.

30 United States of America.

War Department.

Washington, January 20, 1920.

I hereby certify that the telegram of April 29, 1919, setting forth the sentence in the case of Captain William J. Givens and designating the place of his confinement under the sentence was in conformity with the well-established practice and procedure of the War Department in such cases.

P. C. HARRIS,
Major General, U. S. Army,
The Adjutant General.

I hereby certify that P. C. Harris, who signed the foregoing certificate, is the The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Newton D. Baker, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant and Chief Clerk of the said Department, at the City of Washington, this 20th day of January, 1920.

[Seal United States of America. War Office.]

NEWTON D. BAKER,
Secretary of War,
By JOHN C. SCOFIELD,
Assistant and Chief Clerk.

War Department.

Standard Form No. 13.

3-1826.

31 United States of America.

War Department.

Washington, January 20, 1920.

I hereby certify that on April 30, 1918, Major Alva Lee, National Army, now stationed at Salt Lake, Utah, was Assistant Chief of Staff, 81st Division, at Camp Jackson, South Carolina, having been appointed as such Assistant Chief of Staff by Confidential Order No. 46, paragraph 6, War Department, February 25, 1918; and that upon that date he, in performance of his duty incumbent upon him as such Assistant Chief of Staff, did transmit to the Adjutant General of the Army an official report, in the form of a telegram in the following words and figures:

Western Union Telegram.

Camp Jackson, S. C., April 30, 1919.

The Adjutant General of the Army:

Attention Room Three Ninety, Washington, D. C.

Retel April Thirtieth to Commanding Officer, Camp Sevier, S. C. reference sentence adjudged Captain W. J. Givens was quoted in wire to this camp where Captain Givens is in confinement period Sentence was read to Captain Givens this date.

LEE.

Received A. G. O., May 1, 1919.

P. C. HARRIS,
Major General, U. S. Army,
The Adjutant General of the Army.

I hereby certify that P. C. Harris, who signed the foregoing certificate, is the The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Newton D. Baker, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant and Chief Clerk of the said Department, at the City of Washington, this 20th day of January, 1920.

[Seal United States of America. War Office.]

32

NEWTON D. BAKER,
Secretary of War,
By JOHN C. SCOFIELD,
Assistant and Chief Clerk.

War Department.

Standard Form No. 13.

3-1826.

33

United States of America.

War Department.

Washington, January 20, 1920.

I hereby certify that the attached copy of General Court-Martial Orders, No. 139, War Department, April 29, 1919, is a true copy of an order promulgating the sentence of the General Court-Martial in the case of Captain William J. Givens, the original of which is on file in the War Department.

P. C. HARRIS,
Major General, U. S. Army,
The Adjutant General.

I hereby certify that P. C. Harris, who signed the foregoing certificate, is The Adjutant General of the Army, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Newton D. Baker, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant and Chief Clerk of the said Department, at the City of Washington, this 20th day of January, 1920.

[Seal United States of America. War Office.]

NEWTON D. BAKER,
Secretary of War,
By JOHN C. SCOFIELD,
Assistant and Chief Clerk.

War Department.

Standard for No. 13.

3-1826.

34 G. C. M. O.-139.)

War Department,

Washington, April 29, 1919.

General Court-Martial Orders No. 139.

Before a general court-martial which convened at Camp Sevier, S. C., October 30, 1918, pursuant to Special Orders, No. 172, October 10, 1918, Headquarters, Camp Sevier S. C., and of which Col. Orville H. Hall, Infantry, United States Army, was president, and Maj. Stanley F. Coar, Infantry, United States Army, judge advocate, was arraigned and tried—

Capt. William J. Givens, Infantry, United States Army.

Charge I.—"Violation of the 92nd Article of War."

Specification.—"In that Capt. William J. Givens, Inf., U. S. A., did, at or near Camp Sevier, S. C., on or about the 28th day of Sept., 1918, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Pvt. Will McLurkin, 3rd Prov. Dev. Regt., a human being, by shooting him with a revolver."

To which charge and specification the accused pleaded, "Not Guilty."

Findings.

Of the charge, "Not guilty, but guilty of violation of the ninety-third Article of War."

Of the Specification of the Charge, "Guilty, except the words 'with malice aforethought,' 'deliberately,' and 'with premeditation'; of the excepted words 'not guilty'."

Sentence.

"To be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for ten (10) years."

The sentence having been approved by the convening authority and the record of the trial forwarded for the action of the President, under the 48th Article of War, the following are his orders thereon:

In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution.

WOODROW WILSON.

35 The White House, 14 April, 1919.

116011-19.

Captain William J. Givens, Infantry, United States Army, ceases to be an officer of the Army from April 30, 1919.

By order of the Secretary of War:

FRANK McINTYRE,
Major General, Acting Chief of Staff.

Official:

J. T. KERR,
Adjutant General.

Washington: Government Printing Office, 1919.

36 In the District Court of the United States for the Northern District of Georgia.

No. 10, Habeas Corpus.

In the Matter of Petition of WILLIAM J. GIVENS, Petition for Writ of Habeas Corpus.

Traverse to Respondent's Answer.

The petitioner traverses the answer of the Respondent filed herein on the 24th day of January, 1920, and especially denies that part thereof wherein it is alleged that the President designated the United States Penitentiary at Atlanta, Georgia, as a place of confinement as therein set out.

WILLIAM J. GIVENS,
Petitioner.

JOHN S. STRAHORN,
Attorney.

Sworn to before me this 24th day of January, 1920.

JON DEAN STEWARD,
Chief Deputy Clerk of the United States District Court for the Northern District of Georgia.

Filed in Open Court January 24, 1920.

O. C. FULLER,
Clerk.
By JON DEAN STEWARD,
Deputy Clerk.

37 In the District Court of the United States for the Northern District of Georgia.

Ex parte WILLIAM J. GIVENS.

Habeas Corpus.

Opinion of the Court.

The return of the writ showed the applicant held in the United States Penitentiary, Atlanta, Georgia, since May 2nd, 1919, under sentence by a court martial. The exhibited record shows the arraignment and trial of Captain William J. Givens, Infantry, United States Army, on October 30th, 1918, before a General Court Martial convened at Camp Sevier, South Carolina, under Special Order No. 172, Headquarters, Camp Sevier, South Carolina, on a violation of the 92nd Art. of War and specifications, in effect, of murdering a private on September 28th, 1918, by premeditated shooting. There is a plea of "not guilty," and a finding of not guilty of the charge made but guilty of violation of the 93rd Art. of War, with specifications amounting to manslaughter. The sentence is "To be dismissed the service and to be confined at hard labor at such place as the reviewing authority may direct for ten years." The sentence having been approved by the convening authority and the record of the trial forwarded for the action of the President, under the 48th Art. of War, the following order is made thereon: "In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution. Woodrow Wilson, The White House, 14th April, 1919."

The contentions of the applicant are:

1. The Court-Martial was not legal because convened by a Camp Commander, who could only call a special court martial.

2. The record of the trial does not show he was an officer as alleged, nor in any manner amenable to trial by court martial.

3. The court martial had no authority to try him for murder because (*a*) there was a time of peace in the United States when
38 the crime was committed, and (*b*) the pleadings do not negative a time of peace.

4. The sentence as promulgated did not include confinement in the United States Penitentiary at Atlanta or any other place.

1. The Commander of a Camp may, as such and on his own motion, call a special court martial under the 9th Art. of War, but a special court martial may not try a capain; Art. 13. There is, however, in evidence General Order No. 56, promulgated by the Secretary of War under date of June 13th, 1918, which so far as material is as follows: "By direction of the President the Commanding Officer of each of the following camps is empowered, under the 8th Art. of War, to appoint General Court Martial whenever necessary," naming, among 33 camps, "Camp Sevier, Greenville, South Carolina." Besides the inherent power of the Commander in Chief to direct the convening of court martial, Swain v. United States, 165 U. S. 553, Art. 8 declares that general court martial may be appointed "when empowered by the President, by the commanding officer of any district, or force, or body of troops." The Term "district" has no technical military meaning but includes the territory occupied by a permanent military camp such as Camp Sevier. Moreover, the troops at the camp are ordinarily under the command of its commanding officer, so that the President might authorize such officer to convene general courts martial both as the commander of a district and of a body of troops.

2. The record is not defective in failing to refer to General Order 56 as authority for Special Order 172, by which the court was constituted. While courts martial are special courts of limited jurisdiction and have no presumptions to aid them, Runkle v. United States, 122 U. S. 543, 555; McClaughery v. Deming, 186 U. S. 49, 63; still it is not requisite for an inferior court to spread upon the record of each case which it tries the full pedigree of its powers. Its record need not justify its existence generally, but should show the right to try the particular case. Otherwise this record must have shown not
39 only the special order appointing its members and General Order 56, but also that the persons making these orders were really the commanding officer of Camp Sevier and the duly elected President of the United States. Obviously such things need not be made of record because they are to be judicially recognized. So a general order of the War Department is an army regulation and is the law of the army and will surely be judicially noticed by military courts without either allegation or proof, and indeed by the civil courts as well. Jenkins v. Collard, 145 U. S. 547, 560; Caha v. United States, 152 U. S. 211, 221; Gratiot v. United States, 4 Howard, 80, 117.

3. If by the second contention is meant that the evidence produced to the court martial did not sufficiently show that applicant was a Captain in the Infantry of the United States Army, it must be replied that this Court, on heab-as corpus, is not a court of errors for the court martial. The inquiry here is not whether that court decided rightly but whether it could rightly decide at all. Johnson v. Sayre, 158 U. S. 109; Swaim v. United States, 165 U. S. 553, 561; Dynes v. Hoover, 20 Howard 65; McCloughry v. Deming, 186 U. S. 49, 69. Of course the applicant may here contend that he was not in fact a person subject to military law, and was not triable by court martial although that court might have adjudged otherwise, for that denies the jurisdiction in fact of the court, and its record cannot es-

tablish its jurisdiction if indeed it had no authority to make a record.

The evidence introduced here, however, shows that Givens, having served for several months as First Lieutenant, was commissioned as a Captian September 9th, 1918, and accepted his commission September 25th, 1918. The only reply made is that there is no proof he took the oath of allegiance at any time, which is said to be the touchstone of soldierhood. In Re Grimley, 137 U. S. 147, 156. The oath may have been taken long since and being oral may not be capable of convenient proof, but accepting a Captain's commission,
40 carrying the privileges and pay of that office, is amply sufficient proof that the petitioner was subject to military law. Articles of War 2 (*a*).

4. Captain Givens was arraigned for murder under Art. 92, and convicted of manslaughter, punishable under Art. 93. Under Art. 92 he could not be tried by a court martial for murder "committed within the geographical limits of the States of the Union in time of peace." It is said that at no time was there other than peace in the United States, and especially so after the armistice was signed with Germany prior to the promulgation of the sentence in this case. If the right of the court martial to try a military person under Art. 92 was intended to exist only in a place of war and in case the civil courts were closed, it would have been easy to say so, but a time of war is made the test, and it must be held that for military persons, at least, such a time continued from the date of the declaration of war by Congress until some formal proclamation of pease by an authority competent to proclaim it. The rapid movement of soldiers, causing the scattering of witnesses before the civil courts could act, as well as the necessity of firm di-cipline and full control over an army when on a war footing, are prime causes for the substitution of courts martial for civil courts in time of war. These causes existed at Camp Sevier, though the state of active operations was far removed. If in exceptional cases a time of peace may come before official recognition of it and before a demoblization of the armies, this is not such a case. And again, it must be held that the failure of the court martial's record to aver the crime to have been committed in a time of peace is not fatal. On objection duly made it should have been alleged, and doubtless would have been, but if the fact indeed existed, the failure of the record to state it is an irregularity in the record and not a real want of jurisdiction in the court. If the jurisdiction really existed, in meeting a collateral attact it may be shown either by the recitals of the record (which are
41 neither conclusive nor exclusive evidence either way) or by ailunde proof. Galpin v. Page, 18 Wall. 350. The point is of the less prectical merit because petitioner was not convicted under Art. 92 but under Art. 93, as to which a time of peace or war is immaterial. Under familiar rules, he went on trial not only for a charge of murder, but also for every lesser crime included in the offense alleged. He was not tried for murder alone, but for manslaughter and assault also, and was legally convicted of manslaughter. Dynes v, Hoover, 20 Howard, 65, 79.

5. Art. 93 authorized punishment "as the court martial may direct." The court could properly prescribe the kind and duration of the punishment, as it did, but the place of its execution is under legislative control. Ex parte Karstendick, 93 U. S. 396, 400. Weed v. People, 31 N. Y. 465. The time and place of execution are no part of the judicial sentence; Schwab v. Berggren, 143 U. S. 442, 451; In re Cross, 146 U. S. 271; Ex parte Waterman, 33 Fed. 29; O'Brien v. Barr, 49 N. W. (Iowa), 68; they may, under various circumstances, be added or altered after the adjournment of the term of court; Bonner, 151 U. S. 242; State v. Kitchen, 2 Hill (S. C.) 612; Ex parte Nixon, 2 S. C. 4; Blond v. State, 2 Indiana 608; State v. Cardwell, 95 N. C. 643; Kingen v. Kelley, 3 Wyoming 566; In re Bell, 56 Miss. 282; Mills v. Commonwealth, 13 Pa. State, 631; else the specified penitentiary being discontinued or destroyed, a discharge on habeas corpus would result. Other embarrassements would exist in the case of an army in the field. Capt. Givens has been lawfully sentenced to confinement at hard labor for 10 years, and should not be discharged until he has lawfully served it, or been pardoned or paroled. Under Article of War 42 and under Sec. 2 of the Act of March 4th, 1915, 38 Stat. L. 1084, he may lawfully be confined on this sentence in any penitentiary directly or indirectly under the control of the United States. Further, in promulgating this sentence, after confirmation by the President, the Acting Adjutant General, in his order accompanying the court martial
42 record which was sent with the prisoner as a commitment, states that the United States Penitentiary at Atlanta, Georgia, has been designated as the place of confinement. It appears from the evidence that a recommendation of this place by the Secretary of War had accompanied the proceedings when submitted to the President for his confirmation, and there is proof that the designation of the place of confinement in this way, separately from the confirmation proper of the sentence, is the uniform practice of the War Department. It is argued that it should be assumed that the President had orally directed this place of confinement in accordance with the sentence of the court, and not that the Adjutant General had done so; United States v. Page, 137 U. S. 673; United States v. Fletcher, 148 U. S. 84, 89; Wolson v. Chapman, 101 U. S. 755, 770; and see as to presumption of regularity as to the place designated for imprisonment; Ex parte Wilson, 114, U. S. 417, 421. A contrary view could only result in the petitioner's being held until the place could be designated; Bonner, 151 U. S. 242. He would then loose credit for the time he has heretofore been improperly confined.

If there is any objection to his present place of confinement, it can doubtless be changed on such showing as could be made to the President in making now an original designation.

The view will be adpoted that the confinement has been and is lawful and the writ of habeas corpus will be discharged and the petitioner remanded to custody.

This 2 day of Feb'y, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office Feb'y 2nd, 1920.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD.
Deputy.

43 In the District Court of the United States for the Northern District of Georgia.

In the Matter of WM. J. GIVENS,

vs.

FRED G. ZERBST, Warden,

Habeas Corpus.

Petition for Appeal.

And now comes William J. Givens and respectfully represents that on the 2nd day of February, 1920, a judgment and order was entered by this Court dismissing his petition for habeas corpus, and remanding him into custody of Fred G. Zerbst, Warden of United States Penitentiary, Atlanta, Ga.

And your petitioner respectfully shows that in said record proceedings, judgment and order in this cause, manifest errors have intervened to the prejudice and injury of your petitioner, all of which will appear more in detail in the assignment of error which is filed with this petition.

Wherefore, your petitioner prays that an appeal may be allowed him from said judgment to the United States Supreme Court.

JOHN S. STRAHORN,
Annapolis, Md.;
TROUTMAN & FREEMAN,
Attorneys at Law for Petitioner.

Filed in Clerk's Office, 28th day of February, 1920.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

Order Allowing Appeal.

The foregoing petition of Wm. J. Givens for appeal and consideration of the assignment of errors presented therewith it is ordered that the appeal as prayed for be, and the same is hereby allowed,

Cost bond on the appeal is hereby fixed in the sum of $250.00.

44 This 28th day of February, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office, 28th day of Feb'y, 1920.

O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

In the District Court of the United States for the Northern District of Georgia.

In re WM. J. GIVENS, Petitioner,

vs.

FRED G. ZERBST, Warden.

Habeas Corpus.

Assignments of Error.

Now comes William J. Givens, by John S. Strahorn, and Troutman and Freeman, his attorneys, and in connection with his petition for an appeal, says that in the record and proceedings and judgment and order, and during the trial of the above stated cause in said Court, error has intervened and was committed to his prejudice and this petitioner here assigns the following errors, to-wit:

1. The court erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned and in discharging the writ of habeas corpus, and remanding him into custody of respondent. The court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

2. That the court-martial was not legally constituted.

3. That the record as made and authenticated did not show that petitioner was amenable to trial by military court.

4. That there was no authority to try accused for murder committed in the United States during the World War; and even if there was such authority, the pleadings as made did not show such authority.

45 5. That the confinement of petitioner is unlawful; not carried out in accordance with the findings of the court-martial.

6. That the court erred in permitting the introduction of evidence to supplement the record as so made and authenticated.

7. The court erred in dismissing the petition for habeas corpus, discharging the writ, remanding appellant into the custody of respondent.

By reason whereof, this petitioner and appellant prays that said judgment and order may be reversed and that he be ordered discharged.

JOHN S. STRAHORN,
Annapolis, Md.;
TROUTMAN & FREEMAN,
Atlanta, Ga.,
Attorneys for Petitioner and Appellant.

Filed in Clerk's Office, 28th day of Feb'y, 1920.

O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

46 In the District Court of the United States for the Northern District of Georgia.

In the Matter of WM. J. GIVENS, Petitioner,

vs.

FRED G. ZERBST, Warden.

Habeas Corpus.

Cost Bond.

Know all men by these presents, That we, Wm. J. Givens, as principal, and Globe Indemnity Co., as surety, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty & 00/100 ($250.00) Dollars, to be paid to the said United States of America certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 9th day of March, in the year of our Lord One Thousand Nine Hundred and Twenty.

Whereas, lately at the October term, 1919, at the District Court of the United States for the Northern District of Georgia in a suit pending in said court between Wm. J. Givens and the United States of America, a judgment was rendered against the said Wm. J. Givens dismissing his petition for Habeas Corpus and remanding him into the custody, and for costs, and the said Wm. J. Givens having obtained an appeal to the United States Supreme Court to reverse the decree in the aforesaid suit.

Now, the condition of the above obligation is such, That if the said Wm. J. Givens shall prosecute his appeal to effect and answer

all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.
This 9 day of March, 1920.

[SEAL.] WM. J. GIVENS, [L. S.]
Surety: GLOBE INDEMNITY COMPANY, [L. S.]
E. A. ERWIN,

FORREST ADAIR, [L. S.]
Attest.

Approved by:
SAM'L H. SIBLEY,
U. S. Judge.

This 11th day of March, 1920.

Filed in Clerk's Office March 11th, 1920.
O. C. FULLER,
Clerk.

47 In the District Court of the United States for the Northern District of Georgia.

WM. J. GIVENS, Petitioner and Appellant,

vs.

FRED G. ZERBST, Warden, Appellee.

Habeas Corpus.

Præcipe for Record.

The clerk of this court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for the use of the Supreme Court of the United States by including therein the following:

1. The petition for Habeas Corpus and the order of Court thereon.

2. The amendment to the petition and the order of court allowing the same; the amendment to the amendment to the petition and the order of the court allowing same.

3. The writ of Habeas Corpus issued by the court together with the entry of service entered thereon.

4. The answer of respondent together with the Exhibits attached thereto.

5. The traverse to the answer of respondent.

6. The order of court discharging the writ and remanding the petitioner to custody.

7. The opinion of the court in the above entitled cause.

8. The præcipe for record.

9. The notice of the filing of the præcipe served upon the respondent by the attorneys for the appellant.

10. The cost bond, with the approval of the court.

11. The original Citation.

12. The clerk's certificate.

This the 9th day of March, 1920.

JOHN S. STRAHORN,
TROUTMAN & FREEMAN,
Attorneys for Appellant.

Filed in Clerk's Office, March 11th, 1920.

O. C. FULLER,
Clerk,
By C. A. McGREW,
Deputy.

48 In the District Court of the United States for the Northern District of Georgia.

WM. J. GIVENS, Petitioner and Appellant,

vs.

FRED G. ZERBST, Warden and Appellee.

Habeas Corpus.

Notice of Filing Præcipe for Record and Affidavit of Service.

To Fred. G. Zerbst, Respondent and Appellee in the above entitled cause:

Please take notice that on the 9th day of March, 1920, the undersigned filed with the clerk of this court a præcipe for the record to be transmitted to the Supreme Court of the United States on the appeal taken in the above cause, a copy of which præcipe is herewith served on you.

This 9th day of March, 1920.

JOHN S. STRAHORN,
TROUTMAN & FREEMAN,
Attorneys for Appellant.

Personally appeared before me, R. H. Freeman, the subscriber, and makes oath that he delivered a copy of the within notice of the filing of the præcipe to Fred G. Zerbst, the respondent and appellee, in the above entitled cause, on the 10th day of March, A. D. 1920.

R. H. FREEMAN.

Sworn to and subscribed before me this 11th day of March, 1920.

C. A. McGREW,
Deputy Clerk, U. S. District Court, Northern District of Georgia.

Filed in Clerk's Office, March 11th, 1920.

O. C. FULLER,
Clerk,
By C. A. McGREW,
Deputy.

49 UNITED STATES OF AMERICA, *ss:*

To Fred G. Zerbst, Warden of the United States Penitentiary at Atlanta, Ga., or his Attorney of Record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the District Court of the United States for the Northern District of Georgia, wherein William J. Givens is petitioner and appellant and you are respondent and appellant, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States this 28th day of February, in the year of our Lord one thousand nine hundred and twenty.

SAMUEL SIBLEY,
Judge of the District Court for the Northern District of Georgia.

Filed in Clerk's Office 28th day of Feby., 1920.

O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

On this 28th day of February, in the year of our Lord, one thousand nine hundred and twenty, personally appeared H. B. Troutman before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Hooper Alexander, one of the Attorneys of Record for respondent and appellee, Fred G. Zerbst in the above stated case.

H. B. TROUTMAN.

Sworn to and subscribed the 28 day of February, A. D., 1920.

[Seal U. S. District Court, N. D. Georgia.]

JON DEAN STEWARD,
Deputy Clerk, U. S. Court, Northern District of Georgia.

Filed in Clerk's Office 28th day of Feby., 1920.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

[Endorsed:] Citation. Filed in Clerk's Office 28th day of Feby., 1920. O. C. Fuller, Clerk by Jon Dean Steward Deputy C'k. Law offices of Troutman & Troutman, Atlanta, Ga.

50 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern District of Georgia.
Northern Division:

I, Olin C. Fuller, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached forty-nine pages of printing and writing contains a true, full, correct and complete copy of the original record, petition for appeal, order granting appeal, assignments of error, præcipe for record, notice of filing præcipe for record and affidavit thereon, cost bond and the original Citation and affidavit thereon and all proceedings had in the case of William J. Givens, versus Fred G. Zerbst, Warden United States Penitentiary, Atlanta, Georgia, prepared in accordance with præcipe of counsel, as fully as the same remains on file and of record in my office at Atlanta, Georgia, except that the original Citation and Affidavit of Service thereon is annexed hereto instead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court at Atlanta, Georgia, this 12th day of March, A. D., one thousand nine hundred and twenty.

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

[Seal U. S. District Court, N. D. Georgia.]

Endorsed on cover: File No. 27563. N. Georgia D. C. U. S. Term No. 808. William J. Givens, appellant, vs. Fred G. Zerbst, Warden of the United States Penitentiary at Atlanta, Georgia. Filed March 19th, 1920. File No. 27563.

No. 915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

WILLIAM J. DAVIS, Appellant,

v.

PAUL S. EMERY, Warden.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF OF APPELLANT ON APPEAL.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

WILLIAM J. GIVENS, Appellant,	
v.	No. 808.
FRED G. ZERBST, Warden.	

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

MOTION BY APPELLANT TO ADVANCE.

Now comes William J. Givens, Appellant in the above cause, by John S. Strahorn, his Attorney, and respectfully moves the advancement of his case for early hearing during the present term.

The appeal in this case was taken from a judgment of the United States District Court for the Northern District of Georgia (Sibley, J.), dated February 2nd, 1920, discharging the writ of *habeas corpus* theretofore granted and remanding the appellant to the custody of the Appellee, the Warden of the United States Penitentiary at Atlanta, Georgia, in whose custody he now is.

Appellant filed his petition in the lower court, seeking his discharge from custody of the said Warden, under a ten (10) year sentence, beginning May 2nd, 1919, pronounced against him by court-martial in 1918.

Said petition alleged, in substance, that the trial before said court-martial was illegal and void, for the reasons: (1) That said court-martial was not legally appointed; (2) that it had no jurisdiction over the crime alleged; and (3) that no jurisdiction was shown over the person of the accused; and that his confinement was unlawful, since it was not awarded in accordance with the requirements of the findings of the said court-martial; in consequence of which illegal trial and confinement petitioner was deprived of his liberty in violation of the Constitution and laws of the United States; all of which contentions were denied by the lower court in said judgment of February 2nd, 1920, and the appeal herein seeks a reversal thereof, to the end that he may go free.

Notice of this motion has been served by mailing copy hereof to the Solicitor General.

JOHN S. STRAHORN,
Attorney for Appellant.

TROUTMAN & FREEMAN,
Of Counsel.

MARCH 29, 1920.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 285.

WILLIAM J. GIVENS, *Appellant*,

vs.

FRED G. ZERBST, Warden, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

APPELLANT'S BRIEF.

JOHN S. STRAHORN,
Attorney.

TROUTMAN & FREEMAN,
Atlanta, Georgia,

ROBERT R. CARMAN,
Baltimore, Maryland,
Of Counsel.

INDEX.

CASES CITED

TEXTS CITED

OPINIONS JUDGE ADVOCATE GENERAL CITED

STATUTES CITED

IN THE

Supreme Court of the United States

October Term, 1920.

No. 285.

WILLIAM J. GIVENS, Appellant,

vs.

FRED G. ZERBST, Warden, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE APPELLANT.

The appeal in this case is from a finding that the court-martial which tried and convicted the appellant, William J. Givens, was legally constituted, had jurisdiction of the person and the crime for which he was tried, and that the confinement awarded under said trial was conformable to law; all four of which propositions were denied by his petition for *habeas corpus*. This appeal seeks a reversal of said judgment, to the end that he go free.

STATEMENT OF THE CASE.

The appellant filed his petition for *habeas corpus*, in the District Court of the United States for the Northern District of Georgia, on December 15, 1919, seeking his discharge from custody of the Warden of the Atlanta Penitentiary, under a ten (10) year sentence, beginning May 2, 1919, pronounced against him by court-martial on November 19, 1918. His petition alleged in substance:

1. That the court-martial was not legally appointed.
2. That no jurisdiction was shown over the person.
3. That the court-martial had no jurisdiction over the crime.
4. That the confinement was unlawful.

That in consequence of the illegal trial and confinement, petitioner was deprived of his liberty, in violation of the Constitution and laws of the United States. (Record p.p. 1, 2, 3, and 6.)

The petition contained six paragraphs, and by leave of court was twice amended. The fifth paragraph, as so amended, contains the substantial allegations on which the right to be discharged from custody is based, and in its entirety, is as follows:—

> "That the said sentence, and confinement thereunder, are illegal and void, for the reasons, among others, (1) that the record of said trial does not show that at the time of the commission of the crime in question your petitioner was an officer in the United States Army, as alleged against him, nor that he was in any manner amenable to trial by court-martial; (2) that said court-martial had no authority to hear and determine the said charge of murder, or the specification thereunder, as alleged against your petitioner, (a) because there was a time of peace in the United States when the crime in question was committed, (b) because the pleadings did not negative a time of peace;

(3) that said sentence, as so confirmed and promulgated did not include confinement in the United States Penitentiary at Atlanta, Georgia, or at any other place, and (4) because the said court-martial which tried the accused was not legally constituted; in that the officer who appointed the court-martial, was, as is disclosed (a) by the precept shown in the record, (b) by his action in reviewing said case, and (c) by the General Court Martial Order, No. 139, a part of amended paragraph (4) of the petition herein, promulgating the sentence in this case, a Camp Commander, and, as such, had no authority under the Articles of War covering the appointment of courts-martial, to appoint other than a special court-martial." (Record, p.p. 3 & 6.)

The sequence of these four propositions, when referred to hereinafter, will be changed, so as to begin with the appointment of the court, and end with the confinement, thus following the arrangement adopted by the lower court in its opinion. (Rec. p. 27.)

The Charge was brought under the 92nd Article of War, *post*, V(a), and the accused pleaded "Not Guilty," to the following Specification thereunder:

> "In that Capt. William J. Givens, Inf., U. S. A., did, at or near Camp Sevier, S. C., on or about the 28th day of Sept., 1918, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Pvt. Will McLurkin, 3rd Prov. Dev. Reg., a human being, by shooting him with a revolver." (Rec. p.p. 4, 11, & 25.)

The verdict was, substantially: Not guilty of murder, but guilty of manslaughter. (Rec. p.p. 5, 11, & 25), and the sentence was that he be dismissed from the ser-

vice and confined, *in a place to be designated by the reviewing authority*, for a term of ten (10) years. (Rec. p.p. 5, 12 & 26); which was confirmed by the appointing authority, Brigadier General F. H. French (a camp Commander), *without naming a place of confinement*, as follows:

> "Headquarters, Camp Sevier, S. C.,
> Dec. 6, 1918.
> "To the Adjutant General of the Army,
> Washington, D. C.
> "In the foregoing case of Captain William J. Givens, Inf., the sentence is approved and the record of trial is forwarded for action under the 48th Article of War." (Rec. p. 20.)

On March 26, 1919, the record of trial was transmitted to the President, by the Acting Secretary of War, with a concurrence by him in the *recommendation* of the Judge Advocate General, that (1) the sentence be confirmed, and (2) that the Atlanta Prison "*be* designated" as a place of confinement. (Rec. p.p. 20 & 21.) On April 14, 1919, the President, then in Europe, by his own act, confirmed the sentence *without naming a place of confinement*, as follows:

> "In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution." (Rec. p. 21.)

On April 29, 1919, "Kerr," who we afterwards learn (Rec. p. 22), was acting Adjutant General (not Secretary of War), "designated" the Atlanta Prison as a place of confinement (Rec. p.p. 10, 11, & 18); and on the same date, the sentence, as so confirmed, was promulgated in orders by the War Department, *without showing the place of confinement* (Rec. p.p. 4, 11, & 25); and on April 30, 1919, the sentence as so promulgated, was read to Captain Givens, at Camp Jackson, S. C. (Rec. p. 18.)

The writ issued January 8, 1920. On January 24, 1920, the Court heard argument on the petition, and response filed that date; and, on February 2, 1920, filed an opinion, discharging the writ theretofore granted, and remanded the petitioner to the custody of the Warden, where he now is. (Rec. p.p. 27, 28, 29 & 30.)

Ex Parte Givens, 262 Fed. Rep., 702.

I.

ASSIGNMENTS OF ERROR.

1. The Court erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned and in discharging the writ of Habeas Corpus, and remanding him into custody of respondent. The court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

2. That the court-martial was not legally constituted.

3. That the record as made and authenticated did not show that petitioner was amenable to trial by military court.

4. That there was no authority to try accused for murder committed in the United States during the World War; and even if there was such authority, the pleadings as made did not show such authority.

5. That the confinement of petitioner is unlawful; not carried out in accordance with the findings of the court-martial.

6. That the court erred in permitting the introduction of evidence to supplement the record as so made and authenticated.

7. The court erred in dismissing the petition for

habeas corpus, discharging the writ, remanding appellant into the custody of respondent.

Record p. 32.

II.

GENERAL PROPOSITIONS OF LAW AND PROCEDURE INVOLVED.

(a.)

The disciplinary law controlling the Army is found, primarily, in the Manual for Courts-Martial (Ed. 1917). This volume contains all the rules and regulations of the service, covering the status of a soldier when in trouble.

Court-martial jurisdiction is an extraordinary authority created by statute, and is in flat derogation of the common law. This Manual is a codification of all these enactments conferring such unusual powers. Many of its provisions are in direct opposition to the principles of law and procedure applied in the civil courts. Whether or not these provisions seem, or may be, harsh, they are the law of the Army, and all men in the service are presumed to know them; and whether or not they know them or understand them, they are governed by them, and must abide by them, when applied by a court-martial.

Many of these rules seem, and are, arbitrary. Under them, a man's liberty may be bartered away, or his life, even, sacrificed, under circumstances which would not be tolerated in the Civil Courts. Virtually, and oftentimes, actually, in chains; before a court made up of men of superior rank, whom, in spite of everything, he must respect, yes, almost fear; with counsel, if he have any, generally of another's choosing, and, too often, like himself, too timid to make a proper defense, if he know one; an offender against the military code is frequently put in a precarious position for a minor offense. In con-

sequence, it is easy to see why the Civil Courts, when appealed to in actions like the present, have uniformly held the military tribunals to a strict exercise of their functions. To do otherwise would be unjust, and could only result in making it impossible to get worth-while young men into the service, except through compulsion.

As these rules bind a soldier, so do they protect him. They are at once his terror and his refuge, though more often the former. They are the outgrowth of more than a century of military jurisprudence, and embody the wisdom of some of the best legal talent the nation has produced.

A soldier when he takes the oath of allegiance, at the same time subscribes to these rules. What is written in this Manual, either in the Articles of War or the accompanying text, binds at once the government and the accused. The government cannot for its convenience, or for any other reason, ignore or abrogate any of these provisions, any more than an accused soldier may refuse to be bound thereby; both are bound; both are protected.

(b.)

"The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom."

Ex Parte Yerger, 8 Wall., 95.

A court-martial is an inferior court, of special and limited powers, and there is no presumption in favor of its jurisdiction.

Davis Military Law (1915), 42, 139.
McClaughry vs. Deming, 186 U. S., 63.
Deming vs. McClaughry, 113 Fed. Rep., 651.
Brooks vs. Adams, *post*, 11 Pick (Mass.), 442.
Manual for Courts-Martial (1917), 17, Sec. 32.

"* * * * * one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record."

Op. Chief-Justice Marshall, Ex Parte Watkins, 3 Pet. 209.

"It is the settled law that courts-martial are courts of inferior and limited jurisdiction. No presumptions in favor of their exercise of jurisdiction are indulged. To give effect to their judgments imposed, it must be made to clearly and affirmatively appear that the court was legally constituted, that it had jurisdiction of the person and the offense charged, and that its judgment imposed is conformable to the law."

Hamilton vs. McClaughry, 136 Fed., 447.
Citing Dynes vs. Hoover, 20 How., 65.
And Runkle vs. U. S., 122 U. S., 543.

"In courts exercising a special jurisdiction, jurisdictional facts must appear, and, therefore, must be averred and proven, and there are no presumptions as to their jurisdiction over the subject matter, the person, or the property."

Godwin vs. State, 24 Del., 175.

"It is a rule of law, applying to all courts of special or limited jurisdiction, that their records shall show affirmatively, as to each case tried that the court acted with full jurisdiction not only as to the offense itself, but also as to the person of the offender."

Davis Military Law (1915), 96.

"Their judgments upon subjects within their limited jurisdiction, when duly approved or confirmed, are as legal and valid as those of any other tribunals. No appeal can be taken from them, nor can they be set aside, or reviewed by the courts of the United States, nor of any State, but United States courts may, on writ of habeas corpus, inquire into the legality of detention of a person held by military authority, at any time, either before or during trial or while serving sentence, and will order him discharged if it appears to the satisfaction of the court that any of the statutory requirements conferring jurisdiction have not been fulfilled."

Manual for Courts-martial (1917), Sec. 33.

"The general finding of the military court that the petitioner was in the military service of the United States can be no bar to an inquiry into a jurisdictional fact. Otherwise, the findings of military tribunals in respect to all jurisdictional questions would be a bar to any proceedings on the part of the civil court."

In Re Grimley, 38 Fed. Rep., 85.

"A court-martial is a court of limited and special jurisdiction, * * * * * *. The law will intend nothing in its favor. He who seeks to enforce its sentences or to justify under its judgments, must set forth affirmatively and clearly all facts necessary to show that it was legally constituted and had jurisdiction."

Brooks vs. Adams, 11 Pick (Mass.), 442.

"Courts-martial, as has been seen, are courts of limited jurisdiction, and as such their records must show affirmatively that they have authority to hear and determine cases coming before them for trial."

* * * * * * * * * * *

"Being a court of special and limited jurisdiction, a court-martial has only statutory powers, * * * * * *. No presumption can be made in favor of its jurisdiction."

Davis Military Law, 42, 139.

"In order, therefore, that a particular court-martial trial may be valid, the following conditions must be fulfilled: (1) the court must have been properly constituted; (2) the accused must be subject to its jurisdiction; and (3) the crime for which he is tried must be a military offense. A defect in any one of these particulars will be fatal to the jurisdiction. An objection going to a want of jurisdiction cannot be waived by the accused, for criminal courts derive their power to try cases from formally enacted statutes, and can never acquire jurisdiction by the mere consent of the accused, as expressed in his waiver of a well-grounded objection to its jurisdiction."

Davis Military Law, 96-7.

"When confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or one in which having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the statute for its exercise * * * *."

"Persons, then, belonging to the Army and Navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void; not voidable, but void; and civil courts have never failed, upon a proper suit to give a party redress. * * *."

Dynes vs. Hoover, 20 How., 81.

"When we speak of proceedings in a cause, or for the organization of the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken ruling in respect to evidence or law, but a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law."

Manual for Courts-Martial, 19.
Dynes vs. Hoover, 20 How., 81.

"A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction. It was said by Mr. Chief-Justice Waite, in Runkle vs. United States, 122 U. S., 543, 555, 30 L. ed. 1167, 1170, 7 Sup. Ct. Rep. 1141, 1146:

" 'A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. 3 Greenl. Ev. Sec. 470; Brooks vs. Adams, 11 Pick, 441, 442; Mills vs. Martin, 19 Johns. 7, 30; Duffield vs. Smith, 3

Serg & R. 590, 599. Such, also, is the effect of the decision of this court in Wise vs. Withers, 3 Cranch, 331, 2 L. ed. 457, which, according to the interpretation given it by Chief-Justice Marshall in Ex Parte Watkins, 3 Pet. 193, 209, 7 Law ed. 650, 655, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. Dynes vs. Hoover, 20 How., 65, 80, 15 L. ed. 838, 844; Mills vs. Martin, 19 Johns. 33. There are no presumptions in its favor, so far as these matters are concerned. As to them, the rule announced by Chief-Justice Marshall in Brown vs. Keene, 8 Pet. 112, 115, 8 L. ed. 885, 886, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive,—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments'." All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

McClaughry vs. Deming, 186 U. S., 62-3.

We have quoted extensively from this case (McClaughry vs. Deming), for the reason that in some of the prior cases, notably Fletcher's Case, 148 U. S., and In Re Chapman, 166 U. S., one of the principles laid down in Runkles Case, here cited, has been *distinguished* and *criticised*, but those herein set out have stood the test of all the courts, without change.

> " * * * * * * * the tribunal erected to execute these laws was an inferior tribunal, proceeding by force of particular statutes out of the course of the common law; it was a jurisdiction limited by the statute, both as to the nature of the offense and the description of the persons over whom it should have cognizance. Everything ought to have been stated in the proceedings which was necessary to give the court jurisdiction, and to justify the judgment * * *. If the jurisdiction does not appear upon the face of the proceedings, the presumption of law is that the court had not jurisdiction, and the cause was coram non judice; in which case no valid judgment could be rendered."

Ex Parte Watkins, 3 Pet., 204.

Citing Kempe vs. Kennedy, 5 Cranch 184-5.

III.

COURT-MARTIAL NOT LEGALLY APPOINTED.

> "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction."

McClaughry vs. Deming, 186 U. S., 62.

This court-martial was appointed by Brigadier General F. H. French, the commanding officer at Camp Sevier. Under the Articles of War he had no authority to appoint a General Court-Martial, which this was. At the hearing on this petition there was offered in evidence War Department General Order No. 56, of June 13, 1918, as a cure for the (admitted) defect in the appointing order. Casual reading of this General Order discloses that it did not cover *all* troops stationed in Camp Sevier, or who might be found there; only those serving there and who were not of a tactical division stationed there were amenable to its provisions. Furthermore, the right to authorize such appointment as is provided in said General Order is questioned. This reason is, therefore, divisible into four part, to wit:

(a) The appointment on its face is defective.

(b) Is General Order 56 proper to be considered; i. e., can the court-martial record be supplemented by evidence aliunde?

(c) Is this General Order, if proper to be considered, competent under pleadings?

(d) Has the President power to authorize a Camp Commander to appoint general courts-martial?

(a.)

The Appointment on its Face is Defective.

The petition filed herein alleges, and the promulgated sentence shows, that the court-martial which tried the appellant for murder was a general court-martial, appointed by a Camp Commander. Authority to appoint such a court is found in Article of War 8, which does not include Camp Commanders; these latter being, under the express provisions of the next following Article of War (9), competent only to appoint special courts-martial, which latter court could not, under Article of War 13, try an officer. It was alleged—though not proven—that

petitioner was, if anything in the service, a Captain of Infantry. On its face, then, the record is deficient.

> "To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted."
>
> McClaughry vs. Deming, 186 U. S., 63.
>
> "If the jurisdiction does not appear on the face of the proceedings, the presumption of law is that the court has not jurisdiction."
>
> Ex Parte Watkins, 3 Pet. 204.

(b.)

Is General Order 56 Proper to be Considered; i. e., Can the Court-Martial Record be Supplemented by Evidence Aliunde?

The petition denies the sufficiency of the record. The response brought into the case, for the first time, this General Order (56). The mere introduction of this order is proof that it was necessary to the success of the respondent's contention, else why this effort to bolster up the case? Plainly, without it, the writ would have been sustained. Where the response admits the restraint, the burden is on the respondent to show his right to retain the custody of the petitioner. (Hamilton's Case 136 Fed., 447.)

This is a pure question of jurisdiction. If this order is not proper to be considered, this appeal must, on this point, prevail, and the petitioner be given his liberty. Courts-martial are vested with extraordinary powers:—and because of their unusual jurisdiction are held to a strict exercise of their functions. Nothing is "presumed" in their favor, everything must "affirmatively" appear. Their rights are purely statutory in direct derogation of man's common law rights, and being so, they must be, and are, strictly construed, and this is but simple justice.

Davis Military Law, *ante*, 96, 139.
Dynes vs. Hoover, 20 How., 81.

"It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is, jurisdiction. That being established, the habeas corpus must be denied, and the petitioner remanded. That wanting, it must be sustained and the petitioner discharged."

In Re Grimley, 137 U. S., 150.

The general rule in regard to courts of limited and special jurisdiction, such as courts-martial, is stated in Grignon's Lessee vs. Astor, et al, 2 How. 319, as follows:

"The true line of distinction between courts whose decisions are conclusive if not removed to appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the *facts* and *evidence* which are necessary to *sustain* it; whose decision is not

evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities."

The general rule is again stated by this Court in Galpin vs. Page, 18 Wall., 350, as follows:

> "In proceedings had under special statutory authority, where the special powers conferred are exercised in a special manner, not according to the sources of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon their record."

In CYC, Vol. 11, p. 696, the rule is laid down, as follows:

> "Where the statute confers special authority not within the general jurisdiction of the court, to be exercised not according to the course of the common law, sufficient matter must appear of record or on the face of the proceedings to show the case to be within such special jurisdiction. * * * * A court of special, limited or inferior jurisdiction must by its record show all essential or vital jurisdictional facts of its authority to act in the particular case, and in what respect it has jurisdiction. This rule also applies to jurisdiction over special statutory proceedings in derogation of, or not according to, the course of the common law. So

the necessary jurisdictional facts must affirmatively appear by averment and proof to bring the case within the jurisdiction of such courts, etc." (Cyc. Vol. 11, 696.)

"General and special orders, general court-martial orders, and bulletins of the War Department and the headquarters of the several military departments may ordinarily be proved by printed official copies in the usual form. A court-martial will in general properly take judicial notice of the printed order as genuine and correct. A court-martial, however, should not in general accept in evidence, if objected, a printed or written order which has not been made public to the Army without some proof of its genuineness and official character."

Court-Martial Manual, p.p. 137-8.

Wood vs. N. W. Ins. Co., 46 N. Y., 421, *post*, V (b).

State vs. Main, 69 Conn., 123, *post* V (b).

"As it is a record of a court of special and limited jurisdiction, it seems conclusively settled its jurisdiction must affirmatively appear on the face of the record, and in the absence of such affirmative showing its judgment is a nullity.

* * * * * * * * * * *

"As from the record made by such a court, it must affirmatively disclose on its face the jurisdiction and power of the court, it follows, when the record made discloses want of jurisdiction in the court as composed, evidence *de hors* the record may not be admitted to supplement the same."

Op. Pollock, J. In Re Henkes, application for *habeas corpus*, in the District Court of the U. S. for the District of Kansas. Op. filed November, 1919.

This petition must stand or fall on what is contained in the court-martial record; this cannot be enlarged or diminished. Neither the petitioner, nor the government, can go outside the record, since any change in it, by or for either side, at the court's suggestion or with its approval, would be in the nature of a review of the case, and this court has ruled, repeatedly, that the civil courts have no right to correct the proceedings of a military tribunal. If this court cannot "correct," then, *a fortiori*, it cannot consider any new matter which might have direct bearing on the case, no matter how important it might seem. The following language of the Manual would seem to settle the point here made:

> "Will order him discharged if any of the statutory requirements conferring jurisdiction have not *been* fulfilled."
>
> Manual Courts-Martial 18, Sec. 33.
>
> "The facts necessary to show their jurisdiction and that their sentences are conformable to law must be stated positively."
>
> McClaughry vs. Deming, 186 U. S., 63.
>
> *See also:* Brooks vs. Adams, 1 Pick., 442.
>
> Runkle vs. U. S., 122 U. S., 556.
>
> Davis Military Law, 42, 139.

(c.)

Is General Order 56, if Proper to be Considered, Competent Under Findings?

If the Court should be of opinion that General Order 56 is proper to be considered, where in this record is it shown that this petitioner is in the "limited" class it covers, and is, therefore, amenable to its provisions? Section III of this order reads as follows:

> "By direction of the President, the commanding officer of each of the following camps is empowered under the 8th Article of War, to appoint general courts-martial whenever necessary:
>
> * * * * * * * * * * *
>
> "Camp Sevier, Greenville, S. C.
>
> * * * * * * * * * * *
>
> "The jurisdiction of commanding officers of camps under authority of this order shall be *limited* to persons subject to military law who are serving at camps commanded by them and who do not belong to tactical divisions serving thereat, except that the commanding General of a tactical division may in his discretion, direct members of his division against whom charges have been preferred to report or be turned over to the Commanding Officer of the camp at which his division is serving for trial by General Court Martial, transmitting to the Commanding Officer of the camp the charges and all papers in the case * * * * * * * *" (Rec. p. 13.)

The charge and specification in this case (Rec. p.p. 4, 11 & 25) do not enlighten us as to whether William J.

Givens was serving at Camp Sevier, or did not belong to a tactical division serving thereat. While effort has been made by the government to supply other missing links in this case, they have not attempted to show whether William J. Givens was even stationed at this camp, or whether, as might have been the case, he happened there on the night of the crime. So far as this record shows, all we know about William J. Givens is that he was alleged to be a Captain in the United States Army; station? Unknown.

> "When we speak of *proceedings* in a cause, * * * * * we do not mean mere irregularity in practice on the trial, * * * * * but a disregard of the essentials required by the statute under which the court has been convened * * * * *."
>
> Manual Courts-Martial, 19.
> Dynes vs. Hoover, 20 How., 81.

> "The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends."
>
> McClaughry vs. Deming, 186 U. S., 63.
> Runkle vs. U. S., 122 U. S., 555-6.

The right to authorize this appointment is not questioned because of the *manner* in which this General Order (56) was issued; the right of the Secretary of War to (so) act for the President is not denied. The questions here raised are based on statutory provisions. The right is claimed "under the 8th Article of War" (Rec. p. 13). The action is not taken by the President under his "inherent power" to *appoint* such courts (Swaim vs. U.

S., 165 U. S., 553), but is claimed, by express language, under this statute. No one denies the President's right to appoint such courts, *but that is not this case.*

> "Being a court of special and limited jurisdiction, a court-martial has only statutory powers, * * * * *. No presumption can be made in favor of its jurisdiction."
>
> Davis Military Law, 139.

Jurisdiction cannot be conferred on such a court by agrement, nor by the failure of the accused to raise the question by a plea in bar of trial.

> "An objection going to a want of jurisdiction cannot be waived by the accused, for criminal courts derive their power to try cases from formally enacted statutes, and can never acquire jurisdiction by the mere consent of the accused, as expressed in his waiver of a well-grounded objection to its jurisdiction."
>
> Davis Military Law, 96-7.

(d.)

Has the President Power to Authorize a Camp Commander to Appoint General Courts-Martial?

The President is acting under a delegated authority, and a strict observance of his right is required; it must be made clear that he has this right before it can be exercised. Whatever his right, it is conferred by statute, the 8th Article of War. Congress has by plain language (A. W. 9) given to Camp Commanders only the right to appoint special courts-martial. This respondent admits that the convening officer derived his authority, if he had any, from that part of the 8th Article of War, reading as follows:

> "When empowered by the President, the Commanding Officer of any district, or of any force or body of trops, may appoint *general* courts-martial."

The 9th Article of War provides that:

> "The Commanding Officer of a district, garrison, fort, camp, * * * * * may appoint *special* courts-martial."

Did Congress intend to enlarge the powers of a Camp Commander by this provision in Article of War 8 —here relied on—? We say it did not. It did, however. by express language, provide that a "district" commander might be authorized to appoint such higher courts. If it had intended to permit such camp commanders to exercise such enlarged powers "it would have been easy to say so." (Op. Rec. p. 29.)

The learned Judge (Op. Rec. p. 28) says:

> "The term 'district' has no technical military meaning, but includes the territory occupied by a permanent military camp such as Camp Sevier. Moreover, the troops at the camp are ordinarily under the command of its commanding officer, so that the President might authorize such officer to convene general courts-martial both as the commander of a district and of a body of troops." (Rec. p. 28.)

Whether "district" has or has not a technical meaning—and we think it has—Congress, by inclusion of the term along with others such as "garrison," "fort" and "camp," has shown that it is not the same as a camp. (A. W. 9.) There is no proof in this record—nor is it a fact—that Camp Sevier is a "permanent military camp." (Op. Rec. p. 28.) Nor will it suffice to say that "the troops

at the camp are ordinarily under the command of its commanding officer."

> "The authority to convene general courts-martial has been extended to include 'the commanding officer of any district, or of any force or body of troops' when empowered by the President, thus providing for the case of expeditionary forces not the equivalent of a brigade or higher unit, and other emergent services, and permitting general court-martial jurisdiction to be multiplied as the exigencies of the service may require. (Art. 8.)"
>
> Introduction Manual for Courts-Martial, p. xi, Sec. 5.

General French was a Brigadier General and his appropriate command was a Brigade. (Army Regulations 13.) Was this "force or body of troops" an "expeditionary force not the equavilent of a brigade or higher unit"? Certainly not. Was it "other emergent services"? Certainly not. There was no emergency at Camp Sevier. Everything was peaceful there. It is plain to see what was meant. Oftentimes, small detached forces are, as the word implies, separated from their bases, and it is necessary to provide for some higher authority to meet emergent situations as they arise in connection therewith. All the troops at Camp Sevier could have been disciplined without this order; that cannot be denied.

We have no doubt the President *intended* that such (Camp) commanders should be permitted to appoint such higher courts,—but that is not the question. Did *Congress* intend that such commanders should have the right to appoint such a court? Has Congress in this clause of Article of War 8—without using express words, enlarged the powers of Camp Commanders, which powers by ex-

press language, were *limited* by Article of War 9? We say it has not been shown by any manner of authority that Congress did so intend. If Congress did not so intend, then no such right existed, and General Order 56 can have no application to this case; even though it be found that it was offered in evidence at the proper time, and is sufficient, as set out in (c) herein.

> "Within the Runkle case * * * * * this particular Court was not legally constituted to perform the functions for which alone it was convened. It was therefore in law no court."
>
> McClaughry vs. Deming, 186 U. S., 65.

> "* * * but where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment."
>
> Swaim vs. U. S., 165 U. S., 555.
> *Quoting* Keyes vs. U. S., 109 U. S., 336.
> *See also* Ex Parte Watkins, 3 Pet., 204, *supra*, end of II (b).

IV.

NO JURISDICTION SHOWN OVER PERSON OF ACCUSED.

> "If * * * * the facts essential to a valid exercise of the military power conferred by the 58th Article of War (A. W. 92, new code) * * * * * * * are not *shown*, the writ must go, and the petitioner granted his liberty."
>
> Hamilton vs. McClaughry, 136 Fed., 447-8.

At the trial of this case below, before the writ was issued, a preliminary hearing was had, and the court suggested that an amendment of the allegation as to jurisdiction over the person be made, so as to show that *as a fact* petitioner was not an officer in the United States Army. This we declined to do.

The question before the court is not whether William J. Givens was, *in fact*, amenable to military law. The question here is, was it *proven* that he was so amenable. It might have been a fact that he was so amenable, yet if not shown in the record of this inferior court, then this court-martial did not, in contemplation of law, have jurisdiction.

He was not, and could not have been, called upon to deny that the court-martial had jurisdiction over his person, (if it was a *fact* that it did not); he was not compelled to raise this question by a plea in bar of trial (Davis M. L., 96-7).

If it is not true, as alleged under oath in the petition for the writ, that the court-martial failed to show jurisdiction over the person of the accused, the respondent had the means—was able—and *it was his legal duty*, as was done in the McClaughry Case (186 U. S., 553), to produce the original record of trial, as made and authenticated by the President of the Court and the Trial Judge Advocate, to rebut this attack on its sufficiency. It would have been otherwise, had this court-martial record been the child of a tribunal of unlimited powers.

The "evidence" offered below (and we dispute both its competency and sufficiency) on this point means something. (Rec. p.p. 18, 19.) Why was it offered? Though not competent at this late date to be introduced, nor sufficient, if now considered by the court, this court can consider the reason for offering it. This reason is obvious.

The same burden that was on the government in the trial at Camp Sevier is on the respondent now, he having admitted by his answer the restraint and tried to justify under said court-martial proceeding. If this proceeding was bad then, it is bad now; all the infirmities of that record—if there are any—became the inheritance of this respondent, when he filed that answer; his burdens grew heavier, while those of the petitioner, if he ever had any, remained in *statu quo.*

> "So jealous are all English speaking nations of the liberty of their subjects, where a respondent in habeas corpus admits the restraint charged against him, he must justify by basing his right of restraint upon the exercise of some provision of positive law binding upon him, or the writ must issue and the person restrained have his liberty. It follows, therefore, notwithstanding the judgment of conviction by the military court set forth in the return of the respondent and admitted by the petitioner, if * * * * the facts essentional to a valid exercise of the military power conferred by the 58th Article of War * * * * are not *shown,* the writ must go, and the petitioner granted his liberty."
>
> Hamilton vs. McClaughry, 136 Fed., 447-8.

> "Everything ought to have been stated in the procedings which was necessary to give the court jurisdiction, and to justify the judgment."
>
> Ex Parte Watkins, 3 Pet., 204.

If the court should consider the "evidence" offered by the respondent (and it is subject to the same objection

shown in III (b) herein); what does this show? It shows that he accepted his commission on the 27th of September; the crime, as alleged, was committed "on or about the 28th" of the same month (Rec. p.p. 4, 11, 25). This record is silent on just when the crime was committed. Could it not have been committed on the 27th? Was it before the acceptance? The time of the commission of the crime, not the date of the trial, determines amenability, *vel non.*

The record does not disclose that he enjoyed any of the privileges of such office, nor that he had drawn any pay on the night of the murder, *or at any other time* (Rec. p. 29). Nor does it show that he *ever* took the oath of allegiance. The offer of this "evidence" is a bald admission that the allegation of the petition is true, and even if what they offer is competent, it is manifestly insufficient to cure these admitted ills of this court-martial record; since it fails to show the "pivotal fact" which, if introduced at the proper time, might have put life into an otherwise dead corpse.

> "The taking of the oath of allegiance is the pivotal fact which changes the status from that of a civilian to that of soldier."
>
> * * * * * * * * * * * *
>
> "By enlistment the citizen becomes a soldier. He acquires a new status * * * *. He cannot of his own volition throw off the garments he has once put on * * *."

In Re Grimley, 137 U. S., 152-6-7.

This court ruled that Grimley was in the service and could not get out because he had taken the oath of allegiance.

> "In order to become amenable to the military jurisdiction, an officer or soldier must have been legally and fully admitted

into the military service of the United States."

Davis Military Law, 99, 349.

"Every officer before he enters on the duties of his office, subscribes to these Articles (of War) and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them."

Carter vs. McClaughry, 183 U. S., 380.

Has it been shown that William J. Givens "subscribed" to these Articles of War?

"It was a jurisdiction limited by the statute both as to the nature of the offense, and the description of the persons over whom it should have cognizance."

Ex Parte Watkins, *supra.*

"If the facts essential to a valid exercise of the military power are not *shown* the writ must go, and the petitioner granted his liberty."

Hamilton vs. McClaughry, 136 Fed., 448.

See also Grignon's Case, *supra,* III (b).

Requiring affirmative showing before a court-martial of the status of the accused may be novel, and, no doubt, to the military, startling, but it would seem to be, nevertheless, good, sound law, when applied to a controversy pending in such "inferior" court.

"And it is not enough to plead all this, but it must be proven by whomever would defend them. All this is familiar and settled law."

Ex Parte Beck, 245 Fed., 967.

Following McClaughry vs. Deming, 186, U. S.

"It is important that the oath should not be omitted, for the reason that the oath, as taken and subscribed by the party, constitutes the regular, and in some cases the only legal, written evidence that the personal act of enlisting has been completed by him."

Davis Military Law, 249, note.

Ibid, p. 99, *supra*.

If it be true, as alleged in the specification, that he was a Captain in the United States Army, it could have been shown; it should have been shown; and must have been shown, before he could properly be convicted by this court which tried him. This is not a question of improper admission of evidence, but a total failure to show a jurisdictional fact. The "general finding' is not sufficient.

See In Re Grimley, 38 Fed., 85, *supra* II (b).

Also Grignon's Case, *supra*.

Therefore, until and unless it appear, affirmatively, that he took the oath of allegiance (or at least that the court-martial formally found that he was in the service), he was not, insofar as this case is concerned, a soldier, and, if not (shown to be) a soldier, he was not amenable to military law.

V.

NO JURISDICTION OVER CRIME.

(a) A time of peace in the United States when crime was committed.

(b) Pleadings do not negative peace.

(a.)

A Time of Peace in the United States when Crime was Committed.

> "Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."
>
> Article of War 92.

To the average lay mind, to argue that in time of war we are at peace, seems paradoxical, if not ridiculous; while to the uninitiated professional brother, it seems to be the drowning man grasping at the straw; a desperate defense,—not to say expedient,—empty of hope of success, and doomed to failure.

We must not, however, lose sight of the fact that we are living in a "free" country; that a man's liberty is at stake, and that the trial had was by virtue of a statute in derogation of rights which antedate its enactment, are more ancient than the legislature which framed it, and which had their beginnings in the early dawn of judicial history.

The statute (A. W. 92) under which William J. Givens was tried for murder is the successor of Article of War 58 (old code), which was enacted during the Civil War (March 3, 1863), in the midst of a terrible necessity,

while the clash of arms was going on; to aid the civil authorities in supporting the law, where war "raged,"—and, because of which war, the civil courts were dethroned and unable to perform their functions.

In this act of March 3, 1863, is found the first authority for a trial by court-martial of the crime of murder; prior thereto the trial of this and the other more serious crimes was left exclusively to the civil courts.

> "That in time of war, insurrection and rebellion, murder, assault * * * * * burglary, rape * * * * * shall be punishable by the sentence of general courts-martial or military commissions, when committed by persons who are in the military service of the United States, and subject to the Articles of War."
>
> 12 Statutes at Large, 736.

> "But the section does not make the jurisdiction of the military tribunals exclusive of that of the State courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by the State courts. It simply declares that the offenses shall be "punishable," not that they shall be punished by the military courts; and this is merely saying that they may be thus punished."
>
> "Previous to its enactment, the offenses designated were punishable by the State courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of

justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect."

"* * * * *. No public policy would have been subserved by investing them with such jurisdiction, and many reasons may be suggested against it."

Coleman vs. Tenn., 97 U. S., 513-4.

"The Constitution of the United States, like those of the several States, recognizes, as a fundamental principle, that such military jurisdiction as is created by its authority is to be exercised in strict sub-ordination to the civil power."

Davis Military Law, p. 456.
Citing Dow vs. Johnson, *post*.

"We fully agree with the presiding Justice of the Circuit Court, in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield."

Dow vs. Johnson, 100 U. S., 169.

When this case was argued below, but two cases of importance bearing on this statute, to wit: Ex Parte Milligan, 4 Wall. and Coleman's Case, 97 U. S., had been decided by this Court; in neither of which was the direct question here contended for raised. But notwithstanding this latter fact, this Court, in both these cases, interpreted this law generally, and outlined most clearly its views on

what Congress could and did intend when it enacted this legislation.

What did Congress mean when it said in Article of War 92, that no person subject to military law should be tried by court-martial for murder committed "in time of peace?" Did Congress mean, that, because we might be at war with some enemy three thousand miles overseas, when all the courts of the State in which the crime was committed were open, a murder committed in such State should not be tried, *exclusively*, by the courts of that State? Suppose, for example, that we were technically at war with, say, the Republic of Andora, with less than two hundred square miles of territory, and a total population of six thousand souls; would all murders committed in the United Sates by persons subject to military law be triable by court-martial, because we happened to be at war with a handful of people thousands of miles away? If this be so, then our boasted free government would become a mockery, and justice would hang her head in shame. Possibly thousands, deprived of a great common law privilege, without the first semblance of necessity.

> "With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress, in the absence of clear and direct language to that effect."
>
> Coleman vs. Tenn., *supra*.

There should, indeed, be a terrible necessity confronting us before the great majority of officers in our Army should be permitted to sit in judgment in a case of life or death.

> "We by no means assert that Congress can establish and apply the laws of war

where no war has been declared or exists. Where peace exists, the laws of peace must prevail."

Op. Mr. Chief-Justice Chase, Ex Parte Milligan, 4 Wall., 140.

"When the King's courts are opened, it is a time of peace, in judgment of law."

First Parliament Edw. III.
Ex Parte Milligan, 4 Wall., 128.

"When the law can act, every other method of punishing supposed crime is itself an enormous crime."

Ex Parte Milligan, 4 Wall., 128.

"When peace prevails, and the authority of the government is undisputed, there is no difficulty in preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise."

Ex Parte Milligan, 4 Wall., 123-4.

"If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the Army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."

Ex Parte Milligan, 4 Wall., 127.

"Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real; such as effectually closes the courts and deposes the civil administration."

Ex Parte Milligan, 4 Wall., 127.

"The main object of the Article (A. W. 58, *supra*) evidently was to provide for the punishment of the crimes of soldiers in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority cannot be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government."

Winthrop Abdgmt. Mil. Law (1899), 277.

There has been no invasion of the territory of the United States during the World War; the civil tribunals, State and Federal, have been always open; their regular proceedings have not been interrupted, and their processes have been regularly executed. These are facts of public notoriety and a part of the history of the country, of which the courts will take judicial notice. (Ex Parte Milligan.) If armies were collected here, they were to be employed in another locality, on another continent.

The whole history of court-martial jurisdiction shows the supremacy of the civil over the military authority.

In Article of War 57 (old code), Congress expressly stated that only during rebellion could a man be executed for violating its provisions in the United States. Thus they would not allow the death penalty to be imposed by court-martial, except the crime be committed within the

theatre of operations, or "in foreign parts." Why then, we ask, would it now mean to permit a military court to take jurisdiction of this capital crime, committed without the theatre of operations, especially when such crime (murder) was one which necessitated a far greater understanding of the law than that covered by Article of War 57? Instead of enlarging court-martial jurisdiction over these two crimes, Congress has limited their right over them to a more narrow sphere.

When Congress wanted to give a military court the right to inflict capital punishment for crime committed in the United States, it said so, plainly:—"during rebellion against the authority of the United States." By the same Article (A. W. 57, old code), there was no limitation touching crimes committed in "foreign parts," by those "belonging to the armies of the United States."

In the Act of 1916 (A. W. 92) we can easily discover the purpose of Congress to limit the jurisdiction over these two crimes to a time of actual warfare, insurrection or rebellion,—*flagrante bello,* as theretofore was the fact by express language of statute. Since the revision of 1874, the United States had become a world power; our armies were spreading out into "foreign parts," (A. W. 57, old code)—where, like in the United States, during "war, insurrection and rebellion" we had no civil courts, and it was necessary that some jurisdiction to cover these serious crimes follow our armies; and this is clearly shown in the Article in question, where unlimited jurisdiction is given to courts-martial over these two crimes, except when committed by soldiers in the United States or in the District of Columbia.

Indeed, it might be argued, that Congress, knowing the seriousness of these two crimes, as is shown by their inclusion, for the first time, in a separate Article; knowing the many and knotty propositions of law and fact which might be involved in their trial, and knowing the

antipathy of the American people to any interference by the military with civil jurisdiction, was reluctant, and properly so, to give to these *inferior* courts the right to sit in judgment in these *superior* cases, except when and where necessity compelled.

> "The Article (A. W. 58, old code) in investing general courts-martial with a special jurisdiction of certain crimes in time of war, by necessary implication excludes them from exercising jurisdiction over the same in time of peace, except insofar as they may be authorized to exercise it under other Articles."
>
> Winthrop Military Law, 2nd Ed. p.p. 1038-9.

> "It is to be noted that where the hostilities are confined to a particular State or States, or to any particular portion of the territory of the Republic, a court-martial will strictly, be authorized to exercise the jurisdiction conferred by the Article only in cases of crimes committed within the limited theatre of such hostilities, for it is 'time of war,' etc., only in such locality."
>
> Winthrop, p. 1038.

> "Origin and Object: This provision (A. W. 58), which, with but a single material change of language, is a republication of Sec. 30 of the Acts of Congress of March 3, 1863, c. 75, appeared first as an Article of War in the Revision of 1874. Prior to its enactment, courts-martial were not invested either in peace or war, with a jurisdiction of the violent crimes cognizable by the civil courts, except when the same prejudiced 'good order and military discipline.' In 1863, however—during the late Civil War—a

provision incorporated in this Article, initiated in our military law the marked innovation of investing general courts-martial with jurisdiction, in time of war, etc., of the grave civil crimes when committed by military persons, without regard to whether such crimes directly prejudice military discipline or affect the military service. Its main object evidently was to provide for the punishment of these crimes in localities where in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority cannot be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government."

Winthrop, p.p. 1032-3.

Thus the law on this point stood on January 24th, so far as we were able to find it, and thus we urged it upon the lower court, but without success. On April 19th, however, this Court, as we believe, adopted our views on this question without reservation, and made certain that which theretofore was possibly open to argument, and this in a case which is so closely analogous to the present one, that the opinion, unlike those in the *Milligan* and *Coleman* cases, leaves no room for doubt about the soundness of our contention.

The Caldwell Case is too recent to require any but a general statement of his contention; which was:

That under the 92nd Article of War, courts-martial had exclusive jurisdiction over the crime of murder when committed during the World War by one amenable to military law, whether committed within the geographical limits of the United States or the District of Columbia, or elsehere.

By its opinion (April 19, 1920,) this Court not only denied Caldwell's contention, that, under said Article of

War (92), Congress meant that "by mere operation of a declaration of war, the States were completely stripped of authority to try" such (2) cases, but it went further and said:

> "Comprehensively considering these provisions, it is apparent that they contain no direct and clear expression of a purpose on the part of Congress, conceding for the sake of argument that authority existed under the Constitution to do so, to bring about, as the mere result of a declaration of war, the complete destruction of State authority and the extraordinary extension of military power upon which the argument rests. This alone might be sufficient to dispose of the subject for, as said in Coleman vs. Tennessee (97 U. S., 509, 514), 'With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.' Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted, since the Articles of War, originally adopted in 1775 were, as we have seen, in the very midst of the War for Independence modified in 1776 to make certain the preservation of the civil power."
>
> "As in 1866 it was settled in Ex Parte Milligan, 4 Wall., 2, that a state of war, in the absence of some occasion for the declaration of martial law or conditions consequent on military operations gave no power to the military authorities where the civil courts were open and capable of performing their duties, to disregard their authority or to frustrate the exercise by them of their normal and legitimate jurisdiction, it is indeed

open to grave doubt whether it was the purpose of Congress, by the words 'except in time of war,' or the cognate words which were used with reference to the jurisdiction conferred in capital cases, to do more than to recognize the right of the military authorities in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crime specified—a doubt which if solved against the assumption of general military power, would demonstrate, not only the jurisdiction of the State courts in this case, but the entire absence of jurisdiction in the military tribunals. And this doubt becomes additionally serious when the revision of 1874 is considered, since in that revision the Act of 1863 was in terms re-enacted and the words 'except in time of war' appearing for the first time in Article 59 of that revision, could have been alone intended to qualify the time of war with which the Act dealt, that is, a condition resulting from a state of war which prevented or interfered with the discharge of their duties by the civil courts."

Caldwell vs. Parker (unreported),
Op. April 19, 1920, p.p. 5 & 6.

Winthrop Military Law (2nd Ed.),
Vol. II, p. 1033.

(b.)

Pleadings do Not Negative Peace.

If there was a time of war when and where this crime was committed, how does it appear in the record? The pleadings are silent on the subject.

Since it is not alleged, could the court judicially notice that there was a state of war; if there was?

"Judicial notice comes in place of proof and is generally to be exercised by a tribunal which has the power to pass upon the facts. This court will not take judicial notice of the existence of a fact which has not been found by the court below, nor upon which a finding has been refused."

Wood vs. N. W. Ins., Co., 46 N. Y., 421.

"Judicial notice takes the place of proof and is of equal force. * * * * * in its appropiate field it displaces evidence, as it stands for proof, it fulfills the object which evidence is designed to fulfill."

State vs. Main, 69 Conn., 123.

Precedents are found in the *Coleman* and *Milligan* cases. In the former, the averment of a time of war was (first) omitted from the pleadings, and an amendment was made in this particular after demurrer sustained (97 U. S., 511), and,

In the latter, the allegation was "at a period of war and armed rebellion against the authority of the United States." (4 Wall.)

(1) "The decisions of this Court require that averment of jurisdiction must be positive; (2) the facts necessary to show jurisdiction must be stated expressly in the declaration; (3) he who seeks to justify under a court-martial judgment must set forth all facts necessary to show jurisdiction; (4) jurisdictional facts must be averred and proven; (5) it is not enough to plead all this; (6) if facts essential to valid exercise of jurisdiction are not shown, writ must prevail; (7) everything ought to be stated on face of proceedings, to show jurisdiction, otherwise, presumption is that court had not jurisdiction, and

proceedings coram non judice; (8) jurisdictional facts must affirmatively appear, by averment and proof in proceedings exercised in derogation of or not according to the course of the common law."

1—Brown vs. Keene, 8 Pet., 112.
2—McClaughry vs. Deming, 186 U. S., 65.
3—Brooks vs. Adams, 11 Pick, 442.
4—Godwin vs. State, 24 Del., 173.
5—Ex Parte Beck, 245 Fed., 967.
6—Hamilton vs. McClaughry, 136 Fed., 448.
7—Ex Parte Watkins, 3 Pet., 204.
8—Cyc Vol. 11, p. 696; *supra*, III (b).

If the English language means anything; if the decisions of our courts have any weight, then we say, no court can judicially "know" that we were not in a time of peace in South Carolina in 1918, under the charge and specification herein set out; even if it should be (first) decided that there was a war *in this country.*

VI.

CONFINEMENT UNLAWFUL.

(a) Was place properly designated.
(b) Was case properly referred to President.
(c) Could the President act in Europe.

(a.)

Was Place Properly Designated?

The sentence in this case is two-fold: Dismissal *and* confinement; separate and distinct punishments; one might be remitted, and the other executed; or both remitted or executed. It is:

> "To be dismissed the service and to be confined at hard labor, at such place as the reviewing authority may direct, for ten (10) years. (Rec. p.p. 5, 12 & 26.)

This sentence was imposed under the 93rd Article of War, which is as follows:

> "Any person subject to military law who commits manslaughter * * * * * shall be punished as a court martial may direct."

The appointing authority, on review, endorsed the record in the following language:

> "In the foregoing case of Captain William J. Givens, Inf., the sentence is approved and the record of trial is forwarded for action under the 48th Article of War." (Rec. p. 20.)

President Wilson, when he, in Europe, reviewed the record of trial, stated his pleasure, as follows:

> "In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed, and will be carried into execution." (Rec. p.p. 5, 12 & 26.)

The promulgation of the sentence, as so approved and confirmed, is silent as to the place of confinement.

> General Court-Martial Order No. 139, Rec. p.p. 5, 11 & 25.

If it be decided that the President was a legal reviewing authority, there is no dispute here made about the *dismissal*. That is, by direct language of the sentence, imposed, and the War Department Order (No. 139) properly carries it out. And it is a significant fact, that as to this (separate) sentence, this action was taken *"By order of the Secretary of War"* (Rec. p.p. 5, 12 & 26), which was not the case when the attempt to designate a place of confinement was made on the previous day.

This latter act was the act of "Kerr," who, we are afterwards told (Rec. p. 22) by the *Chief Clerk* to the Secretary of War, was the Acting Adjutant General.

Section 401 of the Court-Martial Manual, in part, reads:

> "Date of beginning of Sentence.—The order promulgating the proceedings of a court and the action of the reviewing authority will, when practicable, be of the same date. When this is not practicable, the order will give the date of the action of the reviewing authority which date will be the beginning of the sentence of confinement, as well where dishonorable discharge is imposed as where it is not."
>
> Court Martial Manual, p. 190.

If the contention of the government be correct, then we have the confinement in the penitentiary beginning fifteen days before the place was "designated" by the Acting Adjutant General, the President's action on the sentence having been taken on the 14th of April, and this designation having been made on the 29th of the same month.

Section 400 of the Manual, in part, says:

> "Trials by general courts-martial, including so much of the proceedings as will give the charges and specifications, the pleas, findings, and sentence, and the action and remarks of the reviewing authority will be announced in general orders issued from the War Department, or in general court-martial orders from the headquarters exercising general court-martial jurisdiction," (Manual p. 190)

and refers to Appendix 11 "for forms" promulgating such sentences.

In Appendix 11, Manual p. 376, we fined the following "form:"

> "The sentence is approved and will be duly executed. The United States Disciplinary Barracks is designated as the place of confinement."

This action is not taken by telegram from the chance acting head of a subordinate department of the government, but by formal order.

In Appendix 10 (Manual p. 372-12), "Forms for Original Action," the following is found:

> "Headquarters, ..., ..., 191.
> "In the foregoing case of.....the sentence is approved and will be duly executed. .....is designated as a place of confinement."

The action of the reviewing authority is both *judicial* and *ministerial*. He "decides" and "orders." (Davis M. L., p. 542.) The court-martial did not decide that William J. Givens should be confined in a penitentiary, nor did it say that the Acting Adjutant General should so decide.

> " • • • • • I think it is clear that the statute confers upon the Secretary of War a discretionary or judicial authority, and not a ministerial one, and that, within well settled rules of law, such authority cannot be delegated as here proposed • • •."

Opinions J. A. G. (1917), p. 26.

The appointing power, on review, must act in person (Manual Sec. 376, p. 183), and the reason is obvious.

He must so act, in order to be able, intelligently, to decide whether the findings of the court-martial are in accordance with law and military justice. The court-martial, presumably, knew this, and left it to the reviewing officer to say, after this personal review, whether the accused should be confined in a jail, a penitentiary, the Disciplinary Barracks, or, indeed, whether he should be confined at all.

No one will seriously contend that the Acting Adjutant General's act was other than a mere ministerial act, done in the usual course of business, and without the least understanding of the merits or demerits of the case.

"The personal signature of the President is not," under *Fletcher's* Case, "made essential by law; that of the head of the department to which the subject belongs shall be sufficient for the purpose; the assent of the President to his order or direction being presumed, and his act being deemed in law the act of the President whom he represents" (Davis M. L., p. 545). Here, however, the Secretary did not presume to act for the President. If he does so act, his *"personal signature"* as "the head of the department to which the subject belongs *shall* be" attached.

> A court-martial convened by the Secretary of War: *held* legally constituted; such act of the Secretary being administrative, and in law the act of the President whom he represents. The order here is not a judicial but an Executive act, and like any other Executive order, is legal, if made through the head of the Executive Department to the province of which it pertains."
>
> Op. J. A. G. (1912), III-B-1, p. 491-2.

The sentence in this case does not require—though it permits—confinement in a penitentiary. Under the law of South Carolina, which here applies, this is a misdemeanor. Military offenders have been confined in the Disciplinary Barracks for murder. A man's position in society demands that he be not placed in a penitentiary except upon a clear showing made of the right to put him there.

Whether in form right or wrong,—and it seems to be right—(Manual Sec. 394, p. 189), this court-martial judicially decided that the place should be pointed out by the reviewing authority, (and this means the *original* as well as the *final* reviewing authority); two judicial and ministerial duties, of equal importance, to wit: To approve, or disapprove the findings, and, if approved *in toto,* to name the place of confinement. (*Supra,* forms, Appendices 10 and 11, Manual, p.p. 372-6.)

> "The Reviewing Authority.—This term is employed in military parlance to designate the officer whose province and duty it is to take action upon—approve or disapprove, etc.—the proceedings of a court-martial after the same are terminated, and when the record is transmitted to him for such action. This officer is ordinarily the commander who has convened the court. * * * * * * * *.
>
> "In cases, however, of cases of dismissal and of death imposed in time of peace, and of some death sentences adjudged in time of war, as also of all sentences 'respecting general officers,' while the convening officer (or his successor) is the *original* reviewing authority, with the same power to approve or disapprove as in other cases, yet, inasmuch as it is prescribed by Articles 105, 106, 108 and 109 (old code), that the sentence shall not be executed without the confirmation of the President, the latter becomes in

> these cases the *final* reviewing officer, when, the sentence having been approved by the commander * * * * * * *."
>
> Davis Military Law, p.p. 537-8.
> *See also* Introduction to Manual, Sec. 4, p. xi.

General French did not point out a place. The President did not do so. The Secretary of War did not. The Acting Adjutant General did. Prior to *Fletcher's* Case (148 U. S., 84) the President had to act in person, as decided in *Runkle's* Case (122 U. S., 543). In the present case, the Secretary did not presume to act; all he did was to concur in the "recommendation" of the Judge Advocate General that the penitentiary "be"—not is— designated (Rec. p. 21). The only sentence existing at the time the papers reached the President was the dismissal. And he did not, in any event, war or no war, have to act on the case, so far as this *confinement* was concerned. (A. W. 48.)

The Judge Advocate General has ruled (Davis Military Law, p. 540) that a mere recommendation that the proceedings be approved is not an approval.

Digest J. A. G., 126, par. 2.

The failure of the President and General French (if, indeed, it was a failure, in the sense of an oversight) to designate a place of confinement as required by the sentence of the court, amounts, in law, to a refusal to confirm the sentence *in toto,* and as a constructive remission of that part of it as relates to confinement, leaving the other part, the dismissal from the service, to be executed.

Davis Military Law, p. 551, note.

It is within reason to suppose that they did this deliberately, since it is presumed that they personally examined the proceedings, and a casual reading of the

record will satisfy most minds that the crime committed did not merit more severe punishment, since it was therein shown, and this out of the mouth of the prosecution, that he was drunk at the time the act was committed, had no motive, and was provoked to do it by some remark made by the deceased before he fired the fatal shot. The crime committed did not merit more severe punishment than dismissal.

This sentence, as thus reduced, was published in orders on April 29, 1919. After this no change could legally be made in the sentence, whether the remission of confinement was deliberate or accidental.

Manual, Sec. 387, p. 187; 394-5, p. 189; 400, 401, p. 190; App. X, 372-12.

"A typewritten copy of the General Order publishing the prisoner's sentence * * * * * accompanied him. A printed copy was afterwards received at the prison (Fort Leavenworth). The latter contained the printed notation: 'This order supersedes typewritten order publishing this case.' HELD: That the first order legally completed the action of the reviewing authority, and the subsequent order was null and void."

Digest Judge Advocate General's Opinions (1912-1917), 466.

"After a sentence is once unconditionally remitted, it cannot be renewed or revived. An order purporting to revoke the order promulgating the remission would be void and of no effect.

"A sentence to confinement with forfeiture of pay imposes two distinct and independent punishments. HELD: That the remission of the unexecuted portion of one would not affect the other."

Digest (1912), 840-841.
Ibid, 565, XIV E 9 e, f, g & g1.
Ibid, 569, XIV H 5.
Digest (1912-1917), 177.

"The action of a reviewing authority in approving a sentence of a general court-martial and simultaneously remitting a portion thereof is legally equivalent to approving only the sentence as reduced."
Digest (1912-1917), 8.

If the method adopted in this case to point out the place of confinement, be, as stated by the learned Judge below, the "uniform practice" (Rec. p. 30), we must either declare it unlawful or amend our Manual to conform to this new authority.

(b.)

Was the Case Properly Referred to the President?

When the time came to refer this case to the *final* reviewing authority, it is easy to see that the *original* reviewing authority found himself impaled on the horns of a dilemma. Here was a crime, committed before the Armistice; trial started before and finished after the Armistice; text writers saying all sorts of things about such a situation, and the 48th Article of War requiring that no officer should be dismissed the service in time of *peace* except upon confirmation of his sentence by the President. In this situation, General French chose to send the case to the President, rather than to the Department Commander, who, under this same Article is authorized, in time of *war*, to confirm such sentences.

"Both the legislative history of the 48th Article of War and its unambiguous language require the interpretation • • •

that dismissal of an officer below the grade of Brigadier General shall not be carried into effect until it is approved by the commanding General of the army in the field or by the commanding General of the territorial depart or division."

Op. J. A. G., Dec. 8, 1917.

When the sentence in this case was pronounced (November 19, 1918), and when the reference was made (December 6, 1918), war no longer "raged" in Europe, and the "clash of arms" there was but a terrible memory.

The decisions of the Judge Advocate General's Department are clear, to the effect that if a crime like this is committed during the existence of war, but trial is not had, or sentence imposed, or the record of trial reached the reviewing authority before peace is declared, court-martial jurisdiction does not attach, or is ousted, if already attached.

"While the termination of a state of war does not in general affect the jurisdiction of a court-martial over offenses committed during the war, there are yet special cases in which, by the express terms of a statute, or by implication from its language, the jurisdiction of such a court over certain offenses is restrictd to the period of war. Thus the 58th Article expressly makes the offenses therein enumerated punishable by sentence of general court-martial only in time of war, rebellion, etc., and if, in any case, the war which prevailed at the commission of the offense has ended before the same is actually brought to trial, the court will not be legally competent to take cognizance thereof under this Article."

Winthrop Military Law (1899), 35.

If it be decided, under V (a), that there was a war in this country, then this reference to the President was improper, and *no* final review has been had, and, the sentence having been promulgated, no change can be made, and the writ must be sustained and the petitioner have his liberty.

> "We are of the opinion that in all cases, where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case and to render judgment."
>
> * * * * * * * * *
>
> "and the law in prescribing the punishment, either as to the extent, or the mode, or *the place* of it, should be followed."

In Re Bonner, 151 U. S., 257-8.

(c.)

Could the President Act in Europe?

Did the President have the constitutional right to take action on this case while in Europe?

This question is at once novel and important. We submit it without argument.

VII.

CONCLUDING OBSERVATIONS.

We are not unmindful of the far-reaching effect the sustaining of this petition may have; but that cannot influence us in considering the present matter. A man's liberty is at stake.

If the government has made a fatal error, the petitioner is entitled to any benefit to be derived from it,

notwithstanding the fact that it may disclose like errors by other courts. *No amount of wrongs can make a right.*

This is the only court to which the petitioner can look for relief from a wrongful imprisonment. Military courts are, in effect, courts of original and final jurisdiction. No direct appeal to any other court can be had. If such a court makes a mistake; for example, omits to do an essential thing in the trial of a case (as we here contend), no court of appeals can correct that mistake, even though it may mean that a man, possible beyond its jurisdiction, may be deprived of his life or liberty thereby. Therefore, could there be a graver question before any court, than the one now before this court? A gentleman, deprived of his liberty, suffers more than a hardened criminal at the moment the executioner's trap is sprung.

Until these questions are raised, no difficulty arises; but once they are brought to the attention of the proper tribunal, they must be solved according to law; no matter what effect the proper solution of them may have on other cases in like situation. It cannot be said that public policy demands that such cases be not disturbed to the possible detriment of the reputations of certain officials. Public policy demands that the law be followed in any case, and more especially in a case where the hands of the accused are tied, as here, by having no appellate tribunal before which to seek full justice. Even a possible "general jail delivery over the whole United States," as argued below, will not deter the Court from doing its plain duty.

> "But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole peo-

ple must not be violated or set aside in order to inflict even upon the guilty, unauthorized though merited justice."

* * * * * * * * *

"If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings."

Ex Parte Milligan, 4 Wall., 119.

It is, therefore, respectfully submitted, that the judgment of the lower court should be reversed, and the case remanded, with direction to discharge the petitioner, and restore him to his former position in the Army.

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SUPPLEMENT.

ADDITIONAL AUTHORITIES IN GIVENS VS. ZERBST,

NO. 285.

October Term, 1920.

"The fundamental inquiry is whether the court-martial has jurisdiction, and this must appear affirmatively in the record of the proceedings before *that* court."

In Re Crain, 84 Fed. Rep., 789.

(Precept)

"[By virtue of the express authority vested in me by the President of the United States, in accordance with the provisions of Article 38, Section 1624, title 15, Chapter 10 of the Revised Statutes of the United States,] a general court-martial is hereby ordered to convene, etc."

"This (the above) allegation of the authority of Admiral Bunce to order a court-martial for the trial of the petitioner we deem sufficient. * * * * * we do not think it was necessary to attach to the record of the court-martial a copy of his commission from the president."

In Re Crain, fo. 790.

"It was unnecessary to set forth the orders of the President at large: it was quite sufficient to state that the call was in obedience to them."

Martin vs. Mott, 12 Wheaton, 33.

"Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make those facts a part of the complaint for the purpose of giving jurisdiction to a Federal Court, as the averments, if not sufficient in themselves to give

jurisdiction, present no controversy in respect of which resort may be had to judicial knowledge."

Mountain View Co. vs. McFadden, 180 U. S., 534.

"Court cannot make the complainant's case other than it made it, by taking judicial notice of facts which it did not choose to rely on in its pleading."

State vs. Kansas Co., 183 U. S., 185.

"It is not in the record at all, and for aught that appears, was never brought to the notice of either of the courts in Louisiana, etc."

"We know of no rule of law or practice requiring this, or any other court, to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him."

Burke vs. Miltenberger (86 U. S.) 19 Wall, 519.

"If the court is uncertain as to the fact which it is *called upon* to notice judicially, it may refer to any person or to any document or book of reference to satisfy itself with regard thereto, or it may refuse to take judicial notice of the fact unless and until the party *calling upon it to do so* shall produce such document or book of reference."

Court Martial Manual, fo. 138.

"By the provisions of the Act of August 29, 1916 (38 A. W.): The President may, by regulations which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, etc."

* * * * * * * * * * * * * * *

"The modes of proof, therefore * * * * are now, by express congressional enact-

ment, placed under the authority of Executive regulation; and the rules laid down in this Manual have the force of such regulations."

* * * * * * * * * * * * *

"Where the rule herein laid down is clear, it should be taken as law, * * * * * unless modified by Federal statute or some decision of the Federal Courts made since the date of the publication of the Manual."

Court Martial Manual, Secs. 198-9, p.p. 96-7.

"Section 3 of General Order No. 19, War Department, February 19, 1918, authorizes camp commanders to exercise general court martial jurisdiction in the case where the division commanders and their headquarters are moved from such camps and cantonments, leaving there other troops. Inasmuch as under this order a camp commander may only exercise general court-martial jurisdiction where certain conditions exist, it is *essential that the record affirmatively show* that the conditions prerequisite to the jurisdiction *do exist.*"

Dig. Ops., J. A. G., March 1918, p. 36.

"It is a general rule that a special jurisdictional fact outside the ordinary and intrinsic situation of the thing shall be specially averred in pleading, and certainly that which is contrary to the ordinary course of things should be averred, to give the court knowledge of the fact."

* * * * * * * * * * * * *

"Nor can the want of such averment or showing in the record as the supreme court demands be supplied by proof *aliunde* the record, offered at the trial of the subsequent suit predicated on the alleged judgment."

Henning vs. Planters Ins. Co., 28 Fed. Rep., 443.

"But this was not the assertion of a cause of action, for 'a balance due on any specialty, note or agreement, for money or specific articles, or for goods, wares and merchandise sold and delivered, or for work and labor done.' It might have been for rent due, for money advanced, money received to the use of the plaintiff, and even for money claimed by the plaintiff as due *ex debito*, and charged in the books of the intestate. It is obvious that the magistrate had no authority to take cognizance of these cases, and of others, which might be stated; and since his jurisdiction was strictly *special* and *limited*, it is essential to the validity of his judgment, and of the proceedings under it, that the record should show that he acted upon a case which the law submitted to his jurisdiction."

Walker vs. Turner, 9 Wheaton, 548-9.

"In summary proceedings, where a court exercises an extraordinary power under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction ought to appear on the face of the record. Otherwise, the proceedings are not merely voidable, but absolutely void, as being *coram non judice*."

Thatcher vs. Powell, 6 Wheaton, 119

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Attorney.

Annapolis, Md.,

Oct. 8, 1920.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

WILLIAM J. GIVENS, APPELLANT,
v.
FRED G. ZERBST, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GA. } No. 285.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLEE.

This is an appeal from a judgment of the District Court dismissing a writ of habeas corpus sued out to discharge the appellant from confinement under a sentence of a court-martial.

THE PETITION.

The petition and the amendments thereto allege, in substance, that the petitioner was tried by a court-martial appointed at Camp Sevier, Greenville, S. C., by the commander of the camp; that the charge was a violation of the 92d Article of War, the specification being the murder of a private, one Will McLurkin, on the 28th day of September, 1918, at or near Camp Sevier, South Carolina; that the trial began on October 30, 1918, and was concluded on November 19, 1918, when the petitioner was found not guilty of

violating article 92, or of the specification of murder, but guilty of violating article 93 by committing manslaughter.

A copy of the promulgated sentence was exhibited. It is in the usual form and recites the convening of the court-martial pursuant to Special Orders, No. 172, Headquarters, Camp Sevier, S. C., and that there was arraigned and tried—

> Capt. William J. Givens, Infantry, United States Army.

CHARGE I. VIOLATION OF THE 92D ARTICLE OF WAR.

Specification in that Captain William J. Givens, Inf., U. S. A., did at or near Camp Sevier, S. C., on or about the 28th day of September, 1918, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Pvt. Will McLurkin, 3d Prov. Dev. Rgt., a human being, by shooting him with a revolver. It is then recited that the accused pleaded not guilty to both the charge and the specification, and that the finding was as stated above. Sentence is then recited as follows:

> To be dismissed the service and to be confined at hard labor, and at such place as the reviewing authority may direct, for ten (10) years.

And the document, which is signed by Woodrow Wilson at the White House April 14, 1919, concludes as follows:

> The sentence having been approved by the convening authority and the record of trial forwarded for the action of the President,

under the 48th Article of War, the following are his orders thereon:

In the foregoing case of Captain William J. Givens, Infantry, the sentence is confirmed and will be carried into execution. (Rec. p. 1, 5.)

The record of the court-martial being thus exhibited with the petition is collaterally attacked upon certain specified grounds as follows:

(1) That the record of the trial does not show that at the time of the commission of the crime in question the petitioner was an officer in the United States Army, nor that he was in any manner amenable to trial by court-martial;

(2) That the court-martial had no authority to hear and determine the charge of murder or the specification thereunder, because there was a time of peace in the United States when the crime was committed and because the pleadings did not negative such a time of peace; and

(3) That the sentence as confirmed and promulgated did not include confinement in the United States Penitentiary at Atlanta.

A second amendment to the petition assigned as an additional reason in support of the contention that the sentence and confinement were illegal: that the court-martial which tried the petitioner was not legally constituted, in that the officer who appointed it was a camp commander, and, as such, had no authority under the Articles of War to appoint other than a special court-martial. (Rec. p. 3, 6.)

THE RETURN.

The return asserted the validity of the sentence and confinement and averred that the petitioner had been received at the United States Penitentiary at Atlanta, under and by virtue of a commitment and documents, copies of which were exhibited. These consisted of a letter to the warden of the United States Penitentiary at Atlanta, signed by The Adjutant General of the Army, stating that the sentence had been approved and ordered carried into execution by the President and that the United States Penitentiary at Atlanta had been designated as the place of confinement, and of a copy of the promulgated sentence or General Court-Martial Order No. 139, being the same order, a copy of which was exhibited with the petition.

THE HEARING IN THE DISTRICT COURT.

The opinion of the district judge shows that the case was heard upon the petition and return, and upon evidence introduced on the hearing. The petitioner, however, has not preserved this evidence by a bill of exceptions and it is not a part of the record. Certain documents are copied into the printed record, tending to show that the petitioner was a captain in the United States Army at the time the crime was committed. These papers, however, are not made a part of the record by a bill of exceptions and there is no statement that they constitute all the evidence which was heard by the trial judge. In so far, therefore, as it was compe-

tent to establish by evidence any fact to support the judgment of the district judge it must be presumed that such evidence was introduced and was sufficient to support the judgment.

ISSUES INVOLVED.

There is no averment or claim that the petitioner was not in fact a captain in the United States Army, both when the crime was committed and when he was tried. The collateral attack upon the judgment of the court-martial is limited, except as to the claim that the crime was committed in time of peace, to a claim that the record of the trial fails to show facts essential to give the court-martial jurisdiction. The issues thus presented are:

(1) Does the record of the court-martial show that the petitioner was an officer in the United States Army?

(2) If not, does this render the judgment void or was it competent on the hearing in this case to prove aliunde that the petitioner was such an officer?

(3) Was it essential to the jurisdiction of the court-martial that the crime should have been committed in a time of peace in the United States?

(4) If so, was it necessary that this fact should be averred in the pleading?

(5) Assuming that the sentence was valid, has the United States Penitentiary at Atlanta been properly designated as the place of confinement?

(6) Did the camp commander at Camp Sevier have authority to appoint a general court-martial?

LAWS INVOLVED.

The provisions for trials by court-martial are contained in the Articles of War (39 Stat., ch. 418, pp. 650–670).

Article 2 provides in substance, among other things, that all officers and soldiers of the United States Army shall be included in the term "any person subject to military law."

Article 8 provides by whom general courts-martial may be appointed as follows:

> The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an Army, an Army Corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; * * *

General Orders, No. 56, of the War Department, dated June 13, 1918 (Rec. pp. 12, 13), contain among other things the following:

> By direction of the President, the commanding officer of each of the following camps is empowered under the 8th Article of War to appoint general courts-martial whenever necessary. (Then follows a list of camps, including Camp Sevier, S. C.).

Article 92 of the Articles of War is:

> Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may

direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Article 93 is as follows:

Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

BRIEF.

The very clear and exhaustive opinion of the district judge leaves but little to be said in support of his judgment. (Rec. pp. 27–30.) We have here a collateral attack upon the record of a court-martial which shows that the court-martial was appointed in October, 1918, by the commanding officer of Camp Sevier and tried a captain of Infantry on the charge of having violated article 92 by committing murder in September, 1918; that he was acquitted of this specific charge, but convicted of the charge, included therein, of violating article 93 by committing manslaughter; that the sentence was approved by the convening authority and promulgated by the President; and that by direction of the President the penitentiary at Atlanta was designated as the place of confinement.

Since the case of *Dynes* v. *Hoover* (20 How. 65, 82), there has been no room for doubt as to the

power of the civil courts over the judgments of courts-martial.

> The court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence can not be reviewed or set aside by the civil courts by writ of habeas corpus or otherwise. (*Johnson* v. *Sayre*, 158 U. S. 109, 118.)

The jurisdiction of a court-martial, however, can be challenged through the writ of habeas corpus and the civil courts thus called on to determine whether the jurisdiction existed. But if it appears that the court-martial has acted within the scope of its authority the civil courts can not inquire as to whether there has been error or irregularity in the proceeding.

> A writ of habeas corpus can not be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void. (*Ex Parte Reed*, 100 U. S. 13, 23.)

I.

Record shows petitioner was an officer in the United States Army.

If the petitioner was an officer in the United States Army it must be conceded that he was subject to trial by court-martial on the charge of murder at any time except in a time of peace, and that he was subject to be so tried on a charge of manslaughter at any time. It is nowhere denied in the petition

that he was such an officer, either at the time the crime was committed or at the time he was tried. The only contention is that this fact does not sufficiently appear from the record of the court-martial. It is difficult to see how even this contention is borne out by the record. He was expressly described as a captain of Infantry in the United States Army and is charged with a violation of the 92d Article of War. This clearly shows that he was an officer in the Army. The most that seems to be claimed is that there is no specific averment that he was such an officer on the 28th day of September, 1918, when the crime was committed. This, however, is hypercritical. He was arraigned in October, 1918, and described as an officer in the Army and charged with a violation of the 92d Article of War. The specification is that "Capt. William J. Givens, Inf., U. S. A.," did on or about the 28th day of September, 1918, etc. The pleadings in court-martial proceedings are always brief. Here, however, the accused is described on the day of his arraignment as a captain in the Army, and again in the specification as to what was done on the 28th day of September when the crime was committed, he is described as a captain in the Army. By every fair implication this is a direct charge that while an officer in the Army he committed the crime specified.

The record, therefore, clearly shows all that is necessary to establish jurisdiction so far as that jurisdiction depended upon the accused being an officer in the Army.

II.

Question whether one convicted by court-martial was in fact an officer or soldier of the Army is one for an original inquiry by the civil courts in a habeas corpus proceeding.

As stated above, there is no contention here that petitioner was not, in fact, an officer in the Army. The sole contention in this regard is that the record of the court-martial did not show he was such an officer, at least at the time of the commission of the crime. It can not possibly be denied, however, that the record charges him with being such an officer at the time of his trial. It seems to us equally clear that the same charge is made with respect to the time of the commission of the crime, but if this latter statement was not correct the result would be that the record shows the trial and conviction of an officer and an effort on the part of the accused to show that the crime was committed prior to the time when he became an officer. Murder and manslaughter are both crimes, for which confessedly a court-martial may try an officer. The accused was described as an officer and charged with murder, which included the charge of manslaughter. Other questions aside, this shows a clear case of jurisdiction. So far as concerns the person of the accused and the subject matter of the charge, however, the recitals of the court-martial record are not conclusive.

> It can not be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdic-

> tion, may discharge him from the sentence. (*In re Grimley*, 137 U. S. 147, 150.)

In the case just cited the court said that if Grimley was an enlisted soldier he was amenable to the jurisdiction of the court-martial, and then proceeded to examine the evidence in the habeas corpus case in order to determine whether he was, in fact, an enlisted soldier. In this case the petitioner was tried and convicted as an officer in the Army, as the record shows. If he was not such an officer, it was open to him to collaterally attack the judgment on that ground. While he did not do this, but merely contended that the record failed to show his status as an officer, evidence was introduced from which the trial judge held that he was in fact an officer. The correctness of that conclusion is not now open for review, because the petitioner has not seen fit to make the evidence a part of the record by a bill of exceptions. According to the opinion of the trial judge, the evidence clearly showed that petitioner served for several months as a first lieutenant and was serving as a captain prior to the commission of the crime, and the only effort made to overcome this was the claim that it was necessary for the Government to go further and prove that he actually took the oath. If a bill of exceptions had been filed so that this court could go into this question, it is clearly without merit. It is based entirely on the following language quoted from *In re Grimley* (137 U. S. 147, 156):

> Obviously the oath is the final act in a matter of enlistment. Article 47, respecting de-

sertion, reads: "Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same," etc. By this, either receipt of pay or enlistment determines the status; and after enlistment the party becomes amenable to military jurisdiction, although no actual service may have been rendered and no pay received.

In that case, however, the question as to whether the accused had actually entered the service was seriously contested and all the facts were brought before the court. He had rendered no service and there was a claim that, while he had started to enlist, the enlistment was in fact abandoned, both by him and by the Government. The court, however, simply held that, having taken the oath, there could be no question but that he had in fact enlisted and was, therefore, amenable to trial by court-martial. There was no intimation that a soldier or an officer by actually entering upon the service and the discharge of his duties would not become amenable to such trial even though he neglected to take the oath. And certainly no inference can be drawn from that case to the effect that, in order to prove that a man is either an officer or a soldier, it is necessary to prove that he took the oath. It is safe to say that proof that an officer had accepted his commission, reported for duty, and proceeded to discharge the duties of his office would be held in any court entirely sufficient to establish the fact that he was an officer and subject

to trial by court-martial. There is, in fact, no reason to doubt that in this case the petitioner did take the oath. If he had not, relying as his counsel did on the Grimley case, he would have undoubtedly produced evidence to that effect. But as stated above, this court is now precluded from any inquiry as to whether the petitioner was, in fact, an officer because the evidence upon which the district judge so held is not before the court, and hence the presumption is conclusive that it was sufficient to sustain his judgment.

III.

Question as to whether September 28, 1919, when the crime was committed, was in a time of peace is immaterial.

The next contention is that the crime was committed in a time of peace and, therefore, although an officer in the Army, petitioner was not subject to trial by court-martial. The contention is based upon the proviso of article 92 of the Articles of War to the effect that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union or the District of Columbia in time of peace. The petitioner was charged with a violation of this article by committing murder. If he had been convicted of that charge, then the inquiry as to whether the crime was committed in a time of peace would be pertinent. He was, however, acquitted of the charge of murder and convicted under article 93 of manslaughter. It is equally clear that if he had been charged simply

with a violation of article 93 he would have been subject to trial by court-martial, whether in time of peace or time of war, because there is no limit upon the right to try him under article 93. He was subject to be tried under this article even in time of peace. He has not been sentenced for a violation of article 92 or for the crime of murder. He is not now restrained of his liberty on account of any judgment rendered under the authority of that article. The well-settled practice is, that the charge of murder includes the charge of manslaughter, and that one tried by court-martial upon a charge of violating one Article of War may properly be convicted of violating any other of the Articles of War which are included in that article. Thus in the case of *Dynes* v. *Hoover* (20 How. 65, 77), the accused was tried on a charge of desertion. He was acquitted of that charge but convicted of the charge of attempting to desert and the sentence pronounced upon this judgment was held to be valid. Even if it be conceded that the crime was committed in time of peace and that this would have rendered void any conviction by court-martial on the charge of murder, this concession could have no application to the judgment now under review, which was a conviction of a crime over which a court-martial has the same jurisdiction in time of peace that it has in time of war.

IV.

If it was essential to the jurisdiction of the court-martial that the crime should have been committed in time of war, it was not necessary that the pleadings should allege this fact.

If we assume that the validity of the judgment of the court-martial depends upon the fact that the crime was not committed in time of peace, it was not necessary that this fact should have been alleged in the pleading. The courts take judicial notice of the dates of the commencement and termination of any war in which the country is involved. (*United States* v. *Anderson*, 9 Wall. 56; *Sutton* v. *Tiller*, 6 Coldwell (Tenn.), 593; *Ogden* v. *Lund*, 11 Tex. 688.) If, therefore, it appears from the record that a crime was committed on a date between the commencement and termination of a war, the court may judicially know that the date in question was not in time of peace. In this case the crime was committed in September, 1918, when the United States was actually engaged in hostilities in a war in which nearly the whole world was involved. The trial was actually commenced before an armistice was signed, and concluded a few days thereafter. This court has held that the country was still in a state of war at a date many months later. (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146.) If, therefore, the judgment of the court-martial had been one which it had jurisdiction to pronounce only in time of peace, the judgment would have been authorized since the year 1918 was not a time of peace.

It will be observed that the proviso to article 92 of the Articles of War is, that no person shall be tried by court-martial for murder or rape committed within the jurisdictional limits of the States of the Union and the District of Columbia in time of peace. It is not said that such trials may be held only when the crime is committed within military lines or in territory in which civil courts have been compelled to suspend by reason of war. The distinction made is, that the necessities of actual war require a complete control of those engaged in military service which may not be required when war is not being actually waged. During the year 1918 actual hostilities were being carried on only in Europe, but the war operations conducted in this country were just as essential to success and just as much a part of the war as the fighting which was done across the Atlantic. The training and disciplining of troops in order to fit them for their part in the hostilities was the first essential to the successful conduct of the war. Numerous camps or cantonments were established throughout the country for this purpose. Military authority and discipline was just as necessary in these camps as in any part of the theater of war. Without the recruiting and training done here it would have been impossible to maintain the battle line. A very large proportion of the troops in France were not engaged in actual fighting. They were, however, performing just as important and necessary a function as the combat troops. The

protection of troops in these camps, and the prompt punishment of offenses against them was just as necessary and just as much a part of war operations as if the troops had been within the territory where the war was being waged. Indeed, war was being waged throughout the United States not only through maintaining these camps, but through the operating, night and day, of factories to turn out munitions of war and through myriads of other activities, all with the object of conducting the war to a successful conclusion. Moreover, in this case the crime was committed in one of the camps and by an officer against an enlisted man. These soldiers had been brought together under military command not in time of peace, but in time of flagrant and serious war. Surely the offense, though committed within the United States, was not committed in time of peace, and if the court-martial had found the petitioner guilty of murder there can be no doubt of its right to punish him even for that crime under article 92.

There is nothing in the case of *Caldwell* v. *Parker*, decided by this court on April 9, 1920, which militates against these views. That case dealt with the right of a State court to try and convict a soldier of murder. The case did not turn at all upon the question as to whether the crime was committed in time of peace. On the contrary, it was assumed that, as it was committed while the war with Germany was being waged, it was not committed in time of peace and the ques-

tion considered was whether the military courts had *exclusive* jurisdiction to try the accused. While expressing some doubt as to the exact meaning of the expression "except in time of war," the court declined to consider that question for the reason that if the offense then involved could have been tried by court-martial there was nothing to indicate an intention that the jurisdiction of the military courts should be exclusive. And since, in that case, the State court had first taken jurisdiction, it had the right to try the case even though a court-martial might have had jurisdiction in the first instance. This was in accord with previous holdings to the effect that a judgment by a court-martial would bar a subsequent prosecution in the civil courts for the same offense. (*Drury* v. *Lewis*, 200 U. S. 1; *Grafton* v. *United States*, 206 U. S. 333; *Franklin* v. *United States*, 216 U. S. 559.) Moreover, in that case the court was careful to point out the fact that the offense for which the accused was convicted was "for the murder of a civilian at a place within the jurisdiction of the State and not within the confines of any camp or place subject to the control of the civil authorities of the United States." Whatever doubt might exist of the authority of a court-martial in such a case, there can be no doubt in the case of a soldier accused of the murder of another soldier within the confines of a camp or place subject to the control of the military authority of the United States and where both the accused and the murdered were subject to military control.

V.

The penitentiary at Atlanta was properly designated by the reviewing authority in accordance with the usual practice in such cases.

The next contention is that, even if the petitioner was properly convicted, there is no authority for confining him in the particular penitentiary at which he is confined. This contention is clearly without merit. The sentence was that the petitioner be confined at hard labor at such place as the reviewing authority may direct. This is the form of sentence in common use and authorized in the manual for court-martials, page 189, paragraph 394. Article of War 42 authorizes the execution of such sentences in a penitentiary. In this case the convening authority approved the sentence. The record was then forwarded to The Adjutant General for action. The Secretary of War, pursuant to the 48th Article of War, forwarded it to the President, accompanied by a letter recommending the penitentiary at Atlanta as a place of confinement. (Rec. p. 21.) The President approved the sentence and directed that it be executed. The order designating the penitentiary at Atlanta was signed by The Adjutant General and recited that the President had approved the sentence and that the penitentiary mentioned had been designated as the place of confinement. If it be assumed, however, that the President alone was authorized to designate the place of confinement, this order must be treated as his order. In the

case of *United States* v. *Page* (137 U. S. 673, 680), meeting the contention that the President had not actually signed the order approving the sentence, the court said:

> On the contrary, where the record discloses that the proceedings have been laid before the President for his orders in the case, the orders subsequently issued thereon are presumed to be his and not those of the Secretary by whom they are authenticated; and this must be the result here, where the approval follows the submission in the same order.

This was quoted with approval and reaffirmed in *United States* v. *Fletcher* (148 U. S. 84, 89).

VI.

The camp commander was fully authorized by law to appoint the court-martial.

From what has been said it is obvious that the confinement of the petitioner is lawful if the court-martial was lawfully appointed and convened. The only reason urged against the lawfulness of the appointment, is that the petitioner was convicted by a general court-martial which was appointed by a camp commander, who, it is said, had authority only to appoint a special court-martial. It may be assumed that a camp commander is not one of those officers specifically named in article 8 of the Articles of War as authorized, without further authority, to appoint a general court-martial. But after conferring this authority specifically upon certain named

officers, article 8 provides that, when empowered by the President, the commanding officer of any district or of any force or body of troops may exercise this power.

A body of troops in one of the numerous camps maintained by the Army during the war was, of course, commanded by the commanding officer of the camp. Such an officer, therefore, was clearly included in those whom the President might empower to appoint general courts-martial. The power thus conferred upon the President was exercised by him in General Order No. 56, quoted above, by which he empowered the commanding officers of various camps, including Camp Sevier, to appoint general courts-martial. Apparently it is not denied that the President had the authority to thus empower the commanding officer, or that he did, in fact, exercise that authority. The contention seems to be simply that the petitioner must be released because the sentence as promulgated did not set out or refer to General Order No. 56. But the President was expressly authorized by article 8 of the Articles of War to make such orders as General Order No. 56, and the same being a rule or regulation by which the Army is to be controlled has the full force and effect of law. This court has said:

> It may be laid down as a general rule deducible from the cases, that wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and

> regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice. (*Caha* v. *United States*, 152 U. S. 211, 222.)

This is in accord with numerous cases, some of which are cited in the opinion above quoted from, and others of which are *United States* v. *Grimaud* (220 U. S. 506) and *United States* v. *Symonds* (120 U. S. 46).

Since all courts are bound to take judicial notice of General Order No. 56, it was no more necessary that that order should be recited in the record or sentence of the court-martial than that the Articles of War themselves should have been recited. The unsoundness of the contention is clearly demonstrated in the opinion of the district judge in this case, in which he said:

> The record is not defective in failing to refer to General Order 56 as authority for Special Order 172, by which the court was constituted. While courts-martial are special courts of limited jurisdiction and have no presumptions to aid them (*Runkle* v. *United States*, 122 U. S. 543, 555; *McClaughery* v. *Deming*, 186 U. S. 49, 63), still it is not requisite for an inferior court to spread upon the record of each case which it tries the full pedigree of its powers. Its record need not

justify its existence generally, but should show the right to try the particular case. Otherwise this record must have shown not only the special order appointing its members and General Order 56, but also that the persons making these orders were really the commanding officer of Camp Sevier and the duly elected President of the United States. Obviously such things need not be made of record because they are to be judicially recognized.

This record does show the right of the court-martial to try the particular case, that is, a charge against a captain in the Army of a violation of one of the Articles of War.

CONCLUSION.

It is respectfully submitted that the record of the court-martial has not been successfully assailed, and that the judgment of the District Court dismissing the petition for habeas corpus must be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

R. P. FRIERSON,
Attorney.

August, 1920.

○

SUPREME COURT OF THE UNITED STATES.

No. 285.—October Term, 1920.

William J. Givens, Appellant, *vs.* Fred G. Zerbst, Warden of the United States Penitentiary at Atlanta, Georgia.	Appeal from the District Court of the United States for the Northern District of Georgia.

[January 31, 1921.]

Mr. Chief Justice White delivered the opinion of the Court.

In his return to a writ of *habeas corpus* which was allowed on the petition of appellant averring that he was restrained of his liberty in violation of his constitutional rights, the warden of the penitentiary at Atlanta, asserting the lawfulness of his custody of the petitioner, annexed as part of his return the following documents:

(1) A copy of General Orders, No. 56, issued by the President on June 13, 1918, conferring upon the commanders of designated camps, among them Camp Sevier, S. C., the authority to convene a general court-martial.

(2) General Court-Martial Orders, No. 139, issued by the War Department under date of April 29, 1919, announcing that under Special Orders, No. 172, dated "October 10, 1918, Headquarters, Camp Sevier, S. C.," (issued by the commanding officer of that camp) a general court-martial had convened at Camp Sevier on October 30, 1918, and before it there was arraigned and tried "Captain William J. Givens, Infantry, United States Army," under the charge of having murdered at or near Camp Sevier a named private soldier; that at the trial the accused officer had pleaded not guilty and although acquitted of the charge of murder had been found guilty of manslaughter and had been sentenced to dismissal from the Army and to ten years at hard labor at a place to be designated by the reviewing authority. The order further recited the approval of the sentence by the reviewing authority

(the commander at Camp Sevier) and a like approval, with direction that the sentence be executed, made by the President on April 14, 1919, and concluded by announcing the dismissal of the convicted officer from the Army as of the date of April 30, 1919.

(3) A telegram from the War Department to the commander at Camp Sevier announcing the approval of the sentence by the President; the dismissal of the officer from the Army; that the United States penitentiary at Atlanta, Ga., was designated as the place of confinement, and directing the said commander to deliver the officer to that penitentiary.

(4) A letter from the Adjutant General of the Army of date April 29, 1919, directed to the warden of the penitentiary at Atlanta, transmitting him a copy of the telegram sent to the commanding officer at Camp Sevier, as previously stated, and informing him that in due season a copy of the official order promulgating the trial, conviction and approval of the sentence, would be sent to him.

Upon a traverse of the return and the pleadings the case was heard and in a careful opinion the court, maintaining the sufficiency of the return, discharged the writ and remanded the petitioner to custody, and as the result of an appeal the correctness of its action is here for decision.

The grounds relied upon for reversal relate to three subjects: (1) the alleged illegality of the court because of want of power in the officer by whom it was called to convene it; (2) the failure of the record to show that the accused was an officer in the Army or was in any way amenable to trial by court-martial, and the absence of jurisdiction in the court, in any event, to try a charge of murder because by law no person could be tried by court-martial for murder committed within the United States in time of peace, and there was no averment negativing a time of peace, and that in fact peace prevailed at the time of the trial; (3) the asserted unlawfulness of the confinement of the petitioner in the penitentiary at Atlanta because the record failed to establish that that place had been designated by the President, the final reviewing authority.

We come to test these grounds in the order stated. The court was undoubtedly a general court-martial and was convened by the commander of Camp Sevier. The power to convoke it, how-

ever, is not to be solely measured by the authority possessed by a camp commander, but in the light of the authority given to the President by the 8th Article of War, to empower "the commanding officer of any district or of any force or body of troops" to appoint general courts-martial, and by the exertion of that power by the President manifested by General Orders, No. 56, conferring upon the commanding officer at Camp Sevier the authority to call a general court-martial. True, it is insisted that the words, "the commanding officer of any district or of any force or body of troops," are not broad enough to embrace the commanding officer at Camp Sevier; that, in issuing Order No. 56, the President therefore exceeded the power conferred upon him, and hence that Order No. 56, in so far as it gave the power stated to camp commanders, was void. But the text of Article 8 so clearly demonstrates the unsoundness of the contention that we deem it unnecessary to refer further to it. And as General Orders No. 56 was a part of the law of the land, which we judicially notice without averment or proof (*Gratiot* v. *United States*, 4 How. 80, 117; *Jenkins* v. *Collard*, 145 U. S. 547, 560; *Caha* v. *United States*, 152 U. S. 211, 221), we think the contention that that law should not have been enforced because it was not referred to by the camp commander in exerting the power which he possessed in virtue of that order is also without merit.

These conclusions render no longer applicable the contention that the court-martial was without jurisdiction because a special court appointed by a camp commander had no jurisdiction to try an officer with the rank of captain, but they do not dispose of the proposition that the record failed to show that the accused belonged to the Army without reference to his rank and was therefore subject to trial by a military court.

Conceding that the possession by the accused of a status essential to the exercise by the court-martial of its power was jurisdictional and therefore may not be held to have existed merely because of an estoppel, and conceding further that, except for the form of the charge, the record failed to establish such status, we are brought to determine, as was the lower court, whether evidence was admissible to show such capacity at the time of the trial and conviction and thus make clear the precise condition upon which the court acted.

Undoubtedly courts-martial are tribunals of special and limited jurisdiction whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collateral attack. True, also, is it that in consequence of the limited nature of the power of such courts the right to have exerted their jurisdiction, when called in question by collateral attack, will be held not to have existed unless it appears that the grounds which were necessary to justify the exertion of the assailed authority existed at the time of its exertion and therefore were or should have been a part of the record. *Wise* v. *Withers*, 3 Cranch 331; *Ex Parte Watkins*, 3 Pet. 209; *Dynes* v. *Hoover*, 20 How. 65; *Runkle* v. *United States*, 122 U. S. 543, 555; *McClaughry* v. *Deming*, 186 U. S. 49, 62-63.

The question before us is thus a narrow one, since it comes only to this: In a case, such as that before us, where the power to convoke a court-martial is established on the face of the record and the authority of the court to decide the particular subject before it is therefore undoubted, does the right exist, in the event of a collateral attack upon the judgment rendered, made on the ground that a particular jurisdictional fact upon which the court acted is not shown by the record to have been established, to meet such attack by proof as to the existence of the fact which the court treated as adequately present for the purpose of the power exerted?

Considering that subject in the light stated, we think the court below was right in admitting, as it did, evidence to show the existence of a military status in the accused, since it did not change the court-martial record but simply met the collateral attack by showing that at the time of the trial the basis existed for the exertion by the court of the authority conferred upon it.

It is true that general expressions will be found in some of the reported cases to the effect that wherever a fact upon which the jurisdiction of a court-martial or other court of limited jurisdiction depends is questioned it must appear in the record that such fact was established. But these expressions should be limited in accordance with the ruling which we now make. We so conclude because the complete right to collaterally assail the existence of every fact which was essential to the exercise by such a limited court of its authority, whether appearing on the face of the record or not, is wholly incompatible with the conception that, when a collateral attack is made, the face of the record is

conclusive. Indeed, some of the leading cases make clear the incongruity of any other conclusion and serve to indicate that the expressions as to the face of the record contemplate, not the record assailed by the collateral attack, but the record established as the result of the proof heard on such attack. *Galpin* v. *Page*, 18 Wall. 350; *Runkle* v. *United States*, 122 U. S. 543.

Although there is no bill of exceptions, as the case is here on appeal the evidence upon which the court below acted is open for our consideration and would seem to be in the record, although a compliance with the praecipe of the appellant would have required the clerk to exclude it. Under these conditions we content ourselves with saying that, if as a consequence of the action of the appellant the proof is not in the record, the means of examining the conclusion of the court in that respect would be wanting and we could not disturb the decree appealed from. If on the other hand the documents in the record, not referred to by the praecipe of the appellant, embraced the proof which the court admitted and upon which it acted, we are of opinion that they abundantly sustain the conclusion which the court based upon them and therefore make clear the existence at the time of the trial of a military status in the accused officer adequate to sustain the jurisdiction of the court-martial.

The contention, that the court was without jurisdiction because the trial occurred in a time of peace and that under that condition Article of War 92 deprived courts-martial of jurisdiction to try for murder, has been held to be without merit in *Kahn et al.* v. *Anderson, Warden*, No. 421, this day decided (*ante*, p. —), and therefore disposes of that question as presented here. This renders it unnecessary to consider the Government's insistence, that as the conviction was for manslaughter, the trial was for that crime, although the charge was murder.

As respects the designation of the penitentiary at Atlanta as the place for executing the sentence at hard labor which was imposed, we are of opinion that if effect be given to documents which are in the record and to which the lower court referred it would clearly result that the court rightly held that under the conditions disclosed, the order for confinement at Atlanta was virtually the order of the President, and the contention to the contrary now made is devoid of merit. *United States* v. *Page*, 137 U. S. 673,

678-682; *United States* v. *Fletcher*, 148 U. S. 84, 88-91; *Ide* v. *United States*, 150 U. S. 517; *Bishop* v. *United States*, 197 U. S. 334, 341-342. But, as pointed out by the court below, the mere designation of the place for carrying out the sentence did not involve the jurisdiction of the court (*Schwab* v. *Berggren*, 43 U. S. 442, 451; *In re Cross*, 146 U. S. 271, 277-278), and if erroneous would only lead to retaining the accused for a new designation of place of confinement, and we see no reason under the condition of the record to reverse the action of the court below on that subject.

What we have said disposes of every material contention in the case, although we have not expressly noticed the many suggestions based upon the supposed duty on the trial, before the court-martial, to negative every possible condition the existence of which might have prevented that court from trying the case, among which was the possibility that the officer under trial might have belonged to a command which did not come within the power to call a court-martial conferred upon the camp commander by General Orders, No. 56, particularly since the suggestion now made on that subject seems to have been an afterthought and not to have been called to the attention of the court below in any way.

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.